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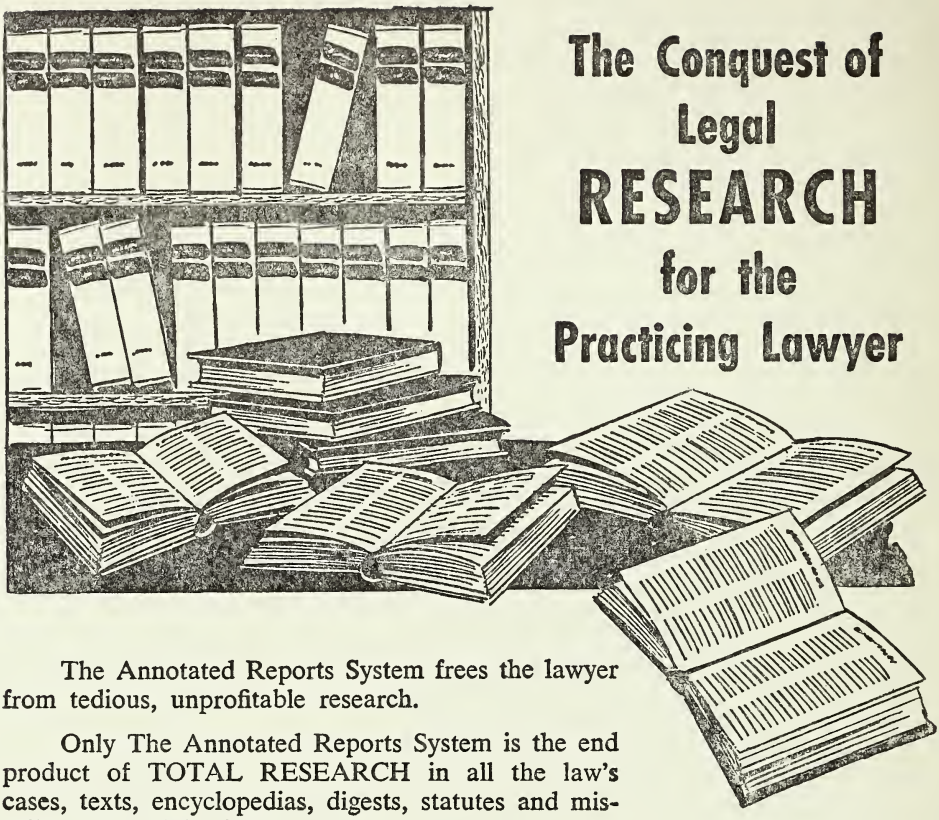

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CORRELATIVE RIGHTS IN OIL AND GAS†

*Eugene Kuntz**

There have been innumerable judicial references to the "correlative rights" of owners of mineral rights in a common source of supply of oil or gas. The references have been particularly frequent in those cases which involve the validity and application of conservation regulations. Although the references have been frequent, the limits of the concept and the component rights included within the general reference still defy definitive and comprehensive description. It is possible, however, from an examination of cases involving rights of owners of mineral interests inter se, to derive a general concept and to identify certain rights which have been recognized.

Owners of land overlying a common source of supply stand in a peculiar relationship to one another in the sense that any extractive operation by one will have an apparent and inevitable effect upon the economic welfare of the others. Under the law of capture, each has the right to extract oil and gas from the common source of supply without accounting to the others for a share of production,[1] but such right must be exercised with due regard for other owners who likewise have rights to extract oil and gas from the same source of supply. The term "correlative rights" is a term used to refer to all of the rights and duties that exist between such owners with regard to operations in a common

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*Professor of Law, University of Oklahoma; Partner: McAfee, Taft, Cates & Kuntz, Oklahoma City.

[1]Alphonzo E. Bell Corp. v. Bell View Oil Synd., 24 Cal. App. 2d 587, 746, 76 P.2d 166, 167 (1938); Triger v. Carter Oil Co., 372 Ill. 182, 23 N.E. 2d 55 (1939); Carlock v. Krug, 151 Kan. 407, 99 P.2d 858 (1940); Hammonds v. Central Ky. Nat. Gas Co., 255 Ky. 685, 75 S.W.2d 204 (1934); McCoy v. Arkansas Nat. Gas Co., 175 La. 487, 143 So. 383, 85 A.L.R. 1147, *cert. denied* 287 U.S. 661 (1932); Toomey v. State Board of Land Com'rs, 106 Mont. 546, 81 P.2d 407 (1938); Application of Repub. Light, Heat & Power Co., 265 App. Div. 74, 38 N.Y.S. 2d 302 (1942); Kelly v. Ohio Oil Co., 57 Ohio St. 319, 49 N.E. 399, 39 A.L.R. 765 (1897); Gruger v. Phillips Pet. Co., 192 Okl. 259, 135 P.2d 485 (1943); Jones v. Forest Oil Co., 194 Pa. 379, 44 Atl. 1074, 48 A.L.R. 748 (1900); Eliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558, 4 A.L.R. 2d 191 (1948); Musgrave v. Musgrave, 86 W. Va. 119, 103 S.E. 302, 16 A.L.R. 564 (1920). See Hassie Hunt Trust Co. v. Proctor, 215 Miss. 84, 60 So.2d 551, 1 O&GR 1644 (1952).

source of supply. Although the elements which are included within the collective term have not been judicially classified or analyzed, a simple classification of rights now recognized suggests itself from the cases. Recognizing that such rights may overlap in any given case, the correlative rights of owners in a common source of supply include: (1) the right against waste of extracted substances, (2) the right against spoilage of the common source of supply, (3) the right against malicious depletion of the common source of supply, (4) the right to a fair opportunity to extract oil or gas. The owners may enter into agreements with each other regarding their correlative rights, and such agreements will be enforced if conservation is not involved.[2]

WASTE OF EXTRACTED SUBSTANCES

In an early case, it was held that the owner of a gas well is privileged to waste the gas by permitting it to escape into the air and an owner in the common source of supply may not prevent such conduct.[3] This case represents the high water mark of the law of capture in the recognition that an owner may use or abuse his right to extract substances from land without regard to the interests of owners in the common source of supply. At present, the judicial attitude is radically different.

The various oil and gas producing states have statutory provisions designed to prevent waste of natural resources and to protect correlative rights of owners in a common source of supply. Whether or not such statutes and regulations pursuant thereto governing operations may form the basis of relief between private parties must be determined in the light of the specific legislation and the law of such states. Independent of statute, however, some limitation upon the rights under the law of capture are recognized at common law. The owner may extract gas for "legitimate" purposes, but another owner of land over the common source of supply may enjoin him from wasting the gas deliberately.[4] Damages may also be recovered for wanton or intentional wasting of gas.[5] Where, however, gas serves the purpose of lifting oil, the owner of the oil rights may permit the gas to escape although another person owns the gas rights in the same tract.[6]

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[2]Railroad Comm. v. Humble Oil & Ref. Co., 193 S.W.2d 824 (Tex. Civ. App. 1946).

[3]Hague v. Wheeler, 157 Pa. 324, 27 Atl. 714, 22 L.R.A. 141, 37 Am.St.Rep. 736 (1893).

[4]Louisville Gas Co. v. Kentucky Heating Co., 117 Ky. 71, 77 S.W. 368, 70 L.R.A. 768 (1908). See Calor Oil & Gas Co. v. Franzell, 128 Ky. 715, 109 S.W. 328, 36 L.R.A. (N.S.) 456 (1908). But see Sneed v. Phillips Pet. Co., 76 F.2d 785 (5th Cir. 1935); Corzelius v. Harrel, 179 S.W.2d 49 (Tex. Civ. App. 1944), *rev'd on other grounds*, 143 Tex. 509, 186 S.W.2d 961 (1945).

[5]Louisville Gas Co. v. Kentucky Heating Co., 132 Ky. 435, 111 S.W. 374 (1908). See Calor Oil & Gas Co. v. Franzell, 128 Ky. 715, 109 S.W. 328, 36 L.R.A. (N.S.) 456 (1908).

[6]Arnold v. Garnett Light & Fuel Co., 103 Kan. 166, 174 P. 1027 (1918).

As to negligent operations which result in waste, the problem is slightly different. If the negligent operation results in a blowout or other single event with resultant waste of gas or other substances, there is no occasion to consider the possibility of an injunction. Where, however, negligent operations are conducted which result in a continuous loss of gas or which threaten to produce a catastrophe, the situation should be treated as a willful or wanton waste of gas, and an injunction should issue.

Where damages are sought for negligent waste of gas, it may make a difference whether the negligence consisted of a single dereliction or was continuing in nature. If negligent operations are conducted which result in continuing loss of gas, damages should be recoverable on the basis of willful or wanton waste of gas if the operations are conducted after the operator is aware of the loss produced. Where the loss results from a single event produced by negligence, such as a blowout, or the negligent failure to bring the well under control after an accident, the result may differ, depending upon the jurisdiction. In Louisiana, recovery was denied where the only damage produced was the exhaustion of gas.[7] The result was predicated upon the impossibility of showing what proportion of the gas wasted came from beneath plaintiff's land and upon the proposition that under Louisiana law the gas was not subject to absolute ownership until reduced to possession. If the plaintiff is able to show that the market value of his mineral rights has been impaired, however, there is reason to believe that recovery would be allowed.[8] In Texas, a different result was reached, based upon the theory of ownership in place and a greater confidence in the possibility of determining the amount of oil and gas recoverable by the various owners in a common source of supply in the light of advances in science. It was held that recovery might be had for damages flowing from negligent operations which result in waste and dissipation of substances from the common source of supply.[9]

As to the measure of damages for waste of extracted substances, there is a division of authority. In Texas, where ownership in place is recognized, it has been strongly suggested that the owner whose land is improperly drained does not lose title to the drained substances and can recover their value.[10] In Kentucky, however, the measure of damages for a malicious waste of gas is not the value of the gas drained or wasted, but is the diminution in value of the natural flow of gas from

[7]Louisiana Gas & Fuel Co. v. White Bros., 157 La. 728, 103 So. 23 (1925). See McCoy v. Arkansas Natural Gas Co., 175 La. 487, 143 So. 383, 85 A.L.R. 1147 (1942), *cert. denied* 287 U.S. 661 (1932).

[8]McCoy v .Arkansas Natural Gas Co., 184 La. 101, 165 So. 632 (1936). But see McCoy v. Arkansas Natural Gas Co., 191 La. 332, 185 So. 274 (1938).

[9]Eliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558, 4 A.L.R. 2d 191 (1948).

[10]Ibid.

the plaintiff's land which resulted from the wrong.[11] In Louisiana, any recovery would possibly be measured by the impairment of value of the mineral rights.[12]

SPOILAGE OF COMMON SOURCE OF SUPPLY

Closely related to the correlative right against waste of extracted substances is the correlative right against spoilage of the common source of supply. Although they are closely related in that waste of substances may involve a damage to the land structures and oil sands, there is a distinction. In one instance, recovery is sought for the value of substances extracted but wasted, whereas in the other instance recovery is sought for underground waste and the reduction of ultimate recovery. As in the instance of waste of extracted substances, the oil and gas producing states have conservation statutes and regulations designed to prevent spoilage of the oil and gas sands and to secure the maximum ultimate recovery of valuable substances. Independent of such statutes, however, each owner extracting oil and gas must do so with due regard for the interests of others having a common right to produce from the same source of supply. He may be enjoined from conducting operations which threaten to spoil the common source of supply, such as pumping out gas in such quantities that back pressure is reduced and intrusion of water into gas bearing sands is accelerated.[13] He may not leave unplugged an abandoned well which permits the intrusion of air and interferes with pumping operations of an adjoining landowner.[14] Damages may be recovered if injury is produced by improper operations. For example, damages may be recovered for damage to the structure of the land because of loss of gas caused by deliberate use of inferior casing or the employment of incompetent and inexperienced drillers who engage in drunkenness on the premises.[15] Recovery may be had for damages arising from the use of a vacuum pump to extract oil contrary to regulations and accepted practices when production from adjoining land is reduced, even after the use of the pump is discontinued.[16] Damages may be recovered for a negligent failure to plug an abandoned well which permits water to enter gas bearing sands and to impede the flow of another's well and to render

[11]Louisville Gas Co. v. Kentucky Heating Co., 132 Ky. 435, 111 S.W. 374 (1908).

[12]See McCoy v. Arkansas Natural Gas Co., 175 La. 487, 143 So. 383, 85 A.L.R. 1147 (1932), *cert. denied* 287 U.S. 661 (1932); McCoy v. Arkansas Natural Gas Co., 184 La. 101, 165 So. 632 (1936).

[13]Mfgrs. Gas & Oil Co. v. Indiana Nat. Gas & Oil Co., 155 Ind. 461, 57 N.E. 912, 50 L.R.A. 768 (1900).

[14]Higgins Oil & Fuel Co. v. Guaranty Oil Co., 145 La. 233, 82 So. 206, 5 A.L.R. 411 (1919).

[15]McCoy v. Arkansas Natural Gas Co., 184 La. 101, 165 So. 632 (1936).

[16]Peterson v. Grayce Oil Co., 37 S.W.2d 367 (Tex. Civ. App. 1931), *aff'd* Grayce Oil Co. v. Peterson, 128 Tex. 550, 98 S.W.2d 781 (1936).

it worthless.[17] The negligent shooting of a well may form the basis of an action for damages.[18] While each operator owes a duty to use care in operations to protect the common source of supply from spoilage,[19] there is no liability for harm caused unintentionally in the absence of negligence, and the doctrine of res ipsa loquitur does not apply.[20] Thus, if an operator discovers that his casing has collapsed and is permitting water to enter the productive sands, he is required to use due care to remedy the situation. If due care is used, no liability is imposed although injury to another's well does result.[21]

MALICIOUS DEPLETION OF COMMON SOURCE OF SUPPLY

In areas of law not involving oil and gas specifically, there has been considerable learned inquiry into the question of whether or not conduct which is otherwise lawful may become unlawful because of the motive of the actor.[22] There are several oil and gas cases which deal with the significance of motive in the exercise of rights under the law of capture. In most instances, however, the cases are not incisive, and the matter of motive is blended with other factors. Also, in most cases, the matter of motive appears by way of dictum. Extracts from two opinions fairly state the divergence of opinion.

> "The question is not as to the motive — fraud or malice — which may have induced the oil company to drill the wells sought to be enjoined. The only question of practical importance is, had the oil company the legal right to drill the wells? When a person has the legal right to do a certain act, the motive with which it is done is immaterial. The right to acquire, enjoy, and own property carries with it the right to use it as the owner pleases, so long as such use does not interfere with the legal rights of others."[23]

Although this statement begs the question, it obviously describes an extremely individualistic attitude toward freedom in the exercise of "rights." To be contrasted is the statement from another case.

17Atkinson v. Virginia Oil & Gas Co., 72 W. Va. 707, 79 S.E. 647, 48 L.R.A. (N.S.) 167 (1913).

18Comanche Duke Oil Co. v. Texas Pacific Coal & Oil Co., 198 S.W. 554, (Tex. Comm. 1927).

19See Elliff v. Texon Drilling Co., 146 Tex. 575, 210 S.W.2d 558, 4 A.L.R. 2d 191 (1948).

20Larkins-Warr Trust Co. v. Watchorn, 198 Okl. 12, 174 P.2d 589 (1946).

21Ibid.

22Prossar, Torts 5 § (2nd ed. 1955); Ames, How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor, 18 Harv. L. Rev. 411 (1905); Duport, Disinterested Malevolence as an Actionable Wrong, 22 Fordham L. Rev. 185 (1953); Eliot, Malice in Tort, 4 St. Louis L. Rev. 50 (1919); Henderson, Malicious Motive as a Ground of Action, 13 Jurid. Rev. 453 (1901); Lawrence, Motive as an Element in Tort, 12 Maine L. Rev. 47 (1919); Lewis, Should the Motive of the Defendant Affect the Question of his Liability, 5 Colum. L. Rev. 107 (1905).

23Kelly v. Ohio Oil Co., 57 Ohio St. 319, 321, 49 N.E. 399, 401, 39 L.R.A. 765, 767 (1897).

> "Upon another trial appellee should be permitted to show, if it can, that appellants or any of them willfully, wantonly, or designedly wasted the gas for the purpose of injuring appellee in its business; in other words, that they acted in bad faith. On the other hand, appellants should be permitted to show, if they can, that they acted in good faith in operating the lampblack factory."[24]

An analysis of the cases reveals that there is a prevalent, though ill defined, notion that motive is a significant factor in determining the limitation that correlative rights place upon the law of capture. The rare case is the one in which motive is described as being immaterial.[25] The cases are also rare in which the possibility of a finding of the presence of malice or bad faith had an influence on the result of the case.[26] In other instances, the cases involve a finding of no liability, but the court in each case felt compelled to observe that malice or a sinister purpose was not present.[27]

As is true in most competitive economic endeavors, the activities of a successful competitive oil or gas operator have an inevitable impact upon the economic welfare of others producing competitively from the same source of supply. Under the law of capture, each is privileged to inflict loss upon the other in the process of seeking an economic advantage, and any loss is damnum absque injuria. Where, however, the loss is inflicted for purposes other than that of seeking a direct economic advantage from the operation, an attempt is made to use the law of capture as an instrument to inflict injury deliberately. In such a situation, it would be reasonable to conclude that the privilege of inflicting loss no longer exists. That is, the privilege of producing from the common source of supply to the economic disadvantage of another owner may be exercised solely for the purposes of realizing direct economic gain and not for a sinister purpose of inflicting harm deliberately upon another.

FAIR OPPORTUNITY TO EXTRACT OIL OR GAS

At an early date, it was observed that proprietors have "coequal" or correlative rights to extract oil and gas from a common source of supply and that such rights may be protected by legislation designed to secure a "just distribution" of the oil or gas and to prevent one pro-

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[24]Louisville Gas Co. v. Kentucky Heating Co., 132 Ky. 435, 437, 111 S.W. 374, 376 (1908).

[25]Kelly v. Ohio Oil Co., 57 Ohio St. 319, 49 N.E. 399, 39 A.L.R. 675 (1897).

[26]Louisville Gas Co. v. Kentucky Heating Co., 132 Ky. 435, 111 S.W. 374 (1908); Peterson v. Grayce Oil Co., 37 S.W.2d 367 (Tex. Civ. App. 1931), *aff'd* Grayce Oil Co. v. Peterson, 128 Tex. 550, 98 S.W.2d 781 (1936).

[27]United Carbon Co. v. Campbellsville Gas Co., 230 Ky. 275, 18 S.W.2d 1110 (1929); Jones v. Forest Oil Co., 194 Pa. 379, 44 Atl. 1074, 48 A.L.R. 748 (1900); Hague v. Wheeler, 157 Pa. 324, 27 Atl. 714, 22 L.R.A. 141, 37 Am. St. Rep. 736 (1893).

prietor from taking an "undue proportion."[28] Whatever was meant by such early observation, it is now clear that what is sometimes referred to as the correlative right to a fair share of oil or gas from a common source of supply means that owners have the right to a fair opportunity to extract oil or gas. It does not mean that one proprietor may enjoin operations by another or may recover a share of oil or gas produced by another person who is particularly diligent or fortunate in developing the area first or otherwise is successful in capturing a greater volume of oil or gas than his neighbors. There has been no instance reported in which a court has allocated production among owners of land over a common source of supply or has determined, in the absence of waste in operations or conservation regulations, whether or not one owner was producing too much. On the contrary, it has been observed that such a problem is one to be presented to the appropriate conservation administrative body.[29]

The right to a fair opportunity to extract oil or gas from a common source of supply has been clearly recognized as a correlative right which must be protected when conservation regulations are imposed which limit the operation of the law of capture. When the right to produce oil or gas is curtailed or denied by conservation regulation, measures must be taken to assure owners equal opportunity to enjoy their fair share of production,[30] and a denial of such equal opportunity would amount to confiscation.[31]

When the number of wells is controlled by conservation regulation, the correlative right to a fair opportunity to extract oil or gas from a common source of supply may be validly recognized and protected by supplementary regulation apportioning production by forced pooling,[32] or granting exception wells and adjusting allowable production.[33] When marketing facilities are limited, regulation designed to protect the correlative right to a fair opportunity to produce and market is valid.[34]

Where, however, density of drilling is controlled under circumstances not amounting to confiscation, but no regulatory measures such as compulsory pooling exist to assure to owners a fair share of production, the Texas Supreme Court has refused to require apportioning

[28]Ohio Oil Co. v. Indiana, 177 U. S. 190 (1900).

[29]Magnolia Pet. Co. v. Blankenship, 85 F.2d 553 (5th Cir. 1936), *cert. denied* 299 U.S. 608 (1936), *rehearing denied* 299 U.S. 624 (1937).

[30]Marrs v. Railroad Comm., 142 Tex. 293, 177 S.W.2d 941 (1944).

[31]Railroad Comm. v. Magnolia Pet. Co., 169 S.W.2d 253 (Tex. Civ. App. 1943).

[32]Hunter Oil Co., Inc. v. McHugh, 320 U.S. 222 (1943); Patterson v. Stanolind Oil & Gas Co., 305 U.S. 376 (1939); Marrs v. City of Oxford, 32 F.2d 134 (8th Cir. 1929), *cert. denied* 280 U.S. 573 (1929); Hunter v. Justice's Court, 36 Cal.2d 315, 223 P.2d 465 (1950); Superior Oil Co. v. Beery, 216 Miss. 664, 63 So.2d 115, 2 O&GR 193 (1953).

[33]Sohio Pet. Co. v. Parker, 319 P.2d 305 (Okl. 1957).

[34]Cities Service v. Peerless Oil & Gas Co., 340 U.S. 179 (1950); Anderson-Prichard Oil Corp. v. Corp. Comm., 207 Okl. 686, 252 P.2d 201, 5 O&GR 99 (1955).

of production from a common source of supply.[35] In other jurisdictions, the administrative establishment of a drilling unit has been held to have the effect of pooling the interests therein, requiring apportionment of production.[36] In Arkansas, a result similar to the one reached in Texas was reached where affirmative action to pool the tracts under existing law was not taken. The court, however, pointed out that there was no proof of drainage and implied that if drainage were proved production would be apportioned.[37]

In conservation administration, the allocation of production from a common source of supply requires a criterion. Allocation of production from small drilling units is on the basis of surface acreage overlying the common source of supply. Such basis is reasonable as a matter of convenience and necessity. When, however, a greater area is involved, the criterion applied gives considerable insight into the matter of the right being protected by allocation of production. In the instances where the problem has been examined carefully, it is apparent that determining the fairness of allocation ultimately involves a determination of what proportion of the common source of supply could have been produced from a particular tract without waste under the law of capture in the absence of regulation. This is apparent when factors such as porosity and permeability of the sands and location on the structure are considered along with acre feet of saturated sands underlying a particular tract.[38]

CONCLUSION

It might be observed that, although the term "correlative rights" may be used loosely as a general reference to a great body of rights and duties arising between and among owners of mineral interests, it certainly does not conceal some mysterious and bewildering concept. It is a simple doctrine that owners of rights in a common source of supply may not inflict loss upon one another by conduct which is considered to be socially undesirable. The owners in the common source of supply operate in a special community, and the social acceptability of conduct within such community must be determined, not only by applying the standards applicable to conduct generally, but by also considering the utility of the conduct in the light of its peculiar consequence to others operating in the same community.

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[35]Ryan Consolidated Pet. Corp. v. Pickens, 285 S.W.2d 201, 5 O&GR 99 (Tex. 1955); Nale v. Carroll, 289 S.W.2d 743, 5 O&GR 1379 (Tex. 1956).

[36]Superior Oil Co. v. Beery, 216 Miss. 664, 63 So.2d 115, 2 O&GR 193 (1953); Griffith v. Gulf Ref. Co., 215 Miss. 15, 60 So.2d 518, 1 O&GR 1627 (1952); Wood Oil Co. v. Corp. Comm., 205 Okl. 534, 239 P.2d 1021, 1 O&GR 132 (1950).

[37]Grayson v. Berry Asphalt Co., Inc., 219 Ark. 447, 243 S.W.2d 1, 1 O&GR 5 (1951).

[38]See, for example, Woody v. Corp. Comm., 265 P.2d 1102, 3 O&GR 465 (Okl. 1954); Anderson-Prichard Oil Corp. v. Corp. Comm., 207 Okl. 686, 252 P.2d 450, 2 O&GR 234 (1953).

Perhaps most important, it should not be concluded that there is a special correlative rights doctrine which renders the rule of capture obsolete, and which is designed to assure to each owner an ascertainable share of the common source of supply to be derived from calculations designed to do complete justice. Correlative rights are complementary to the rule of capture in that they provide the refinements of law required to describe fair play under that rule.

FEDERAL INCOME TAX DEDUCTIONS OF BAWI LEASEHOLD PAYMENTS

*Shirley Norwood Jones**

There is ever increasing interest in Mississippi in the State's efforts, through its Agricultural and Industrial Board, to obtain industry for Mississippi. All of us are familiar with the State's program to Balance Agriculture with Industry, often referred to as the BAWI program. Efforts are constantly being made, not only in Mississippi but also in other states, to secure more favorable conditions for industry.

There have been 144 new industries established and 47 expansions of existing industries in Mississippi under the BAWI program since it was first enacted into law in 1936.[1] An example of a typical BAWI lease is that of Gem, Inc., a small factory in Byhalia, Marshall County, Mississippi. Dozens of other plants are using a similar type of lease in the State of Mississippi. It is the similarity of these leases that makes the Tax Ruling received by Gem, Inc., important.

Gem, like many of the BAWI factories, is operating (to summarize briefly) under a 20-year lease with options to renew. The property rented consists of a factory building constructed under Mississippi's Balance Agriculture with Industry program and financed by a bond issue. Under such a contract the county or political subdivision acquires title to the land and has a factory building erected on the land. The county finances the contract by issuing full faith and credit bonds. The rental for the leased premises is usually set at a sum which is sufficient to relieve the county of the obligation to levy taxes to meet the maturities of principal or interest of any of the bonds. Such a lease customarily provides for termination if operations cease for a period of one (1) year. The contract usually provides for renewal periods; in Gem's case for three (3) additional periods of twenty (20) years each and one (1) period of nineteen (19) years. The rental after the primary term of the lease is usually considerably less than the rental which has previously been paid in order to pay off the bonds. The agreement is subject to termination if the factory defaults in payment of rent.

The local office of the Internal Revenue Service for Gem's District raised the question of whether these leasehold payments could be deducted as rent when paid or whether they must be amortized over the useful life of the premises and only 1/40 or 1/50 of the total rent

*Watkins, Edwards and Ludlam, Attorneys at Law, Jackson, Mississippi.

[1]Information furnished by Henry Maddox, Chairman, Mississippi Agricultural and Industrial Board.

deducted in one year, depending on whether the useful life of the premises is 40 or 50 years. A request was made by the local office of the Internal Revenue Service to the Washington office, Tax Rulings Division of the Treasury Department. Two principal issues were involved in the Request for Ruling.

1. Whether amounts paid Marshall County over the primary term of the lease, plus the amounts provided for in the renewal clause, are payments for the acquisition of a beneficial interest which should be amortized over the estimated useful life of the premises; and

2. Is there such a reasonable certainty that Gem, Inc. will renew its lease that the payments made by Gem should be spread over the estimated life of the premises?

To sum up, the problem is whether or not payments made under BAWI leases as rental are in fact rental at all or whether these payments are to be treated as if they were payments on the purchase price of a building which must be amortized over the useful life of the premises.

The factories which deduct their payments as rent do so under Section 162 of the Internal Revenue Code of 1954 which provides, insofar as pertinent, as follows:

> "(a) IN GENERAL. – There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business including–
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> * * * * *
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> "(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

Every factory which comes into a town or community under the Mississippi BAWI Law comes into the community with two primary obligations under its lease. The first obligation is the payment of rent, usually in a sum sufficient to discharge the bonds and coupons issued by the municipality as they mature, and the second obligation is the continued operation of a manufacturing plant of the character prescribed in the lease so as to provide employment in the community.

Every BAWI lease contract carries this additional requirement of operation of the industry in order to provide employment. This is an important obligation and is an obligation read into the contract by the Mississippi Supreme Court, even in those instances where no reference is made to continued operation in the actual lease.[2]

The original Balance Agriculture with Industry program was en-

[2]Albritton v. City of Winona, 181 Miss. 75, 177 So. 799 (1938).

acted into law in 1936.[3] At that time the State was in an acute economic emergency which the BAWI program was designed to alleviate. The present BAWI program appears as Sections 8936 through 8936-24 of the Mississippi Code of 1942, as amended.

These statutes state that the program is demanded by public policy. Under the above mentioned sections of the Code the Agricultural and Industrial Board is charged with the duty of making effective the public policy as declared in the Act. The Mississippi statute is so written that the bonds must mature annually with all maturities not longer than twenty-five (25) years.[4] In conformity with the A. & I. Board's general policy, the Board requires that the rental payment specified in the lease shall be such annual sums as will enable the county each year to pay the principal and interest of the bonds as they mature.

The Mississippi Supreme Court has clearly pointed out that it is necessary that the lessee be required to operate the plant in order to have a valid BAWI lease.[5] It is carefully pointed out that the enterprise must be for a public purpose and not simply in aid of private individuals. The lease must be of such character as will insure the continued operation of the proposed industry with power in the municipality, under the supervision of the A. & I. Board, to enforce continued operation.

The present policy of the A. & I. Board requires the county or municipality to set the rentals high enough to cover all costs during the primary term of the lease. The BAWI policy is designed to make the chances reasonable that a particular lease will pay its own way and pay out its bonds without principal and interest having to be raised from the citizens of the county by taxation. The length of the primary term of the lease is geared to the maturity dates of the bonds, and the maturity dates of the bonds are primarily determined by the county and the potential buyers of the bonds.

The Ruling received by Gem can be summed up by the following quotation:

> "Contrary to the taxpayer's position, as outlined in summary above, it is the view of this office, based upon the information available and the authorities cited hereinafter, that the aggregate amount of rentals payable over the period corresponding to the estimated useful life of the improvements should be spread in aliquot parts over such period. In other words, the total rentals payable by a lessee over the period of the useful life of property (where the combined terms of the lease available to the lessee extend beyond such useful life) should not be attributed in any greater pro-

[3]Senate Bill No. 1, c. 1, Gen. Laws Miss., 1st Extra Sess., 1936.
[4]Miss. Code Ann. § 8936-13 (1942).
[5]Albritton v. City of Winona, 181 Miss. 75, 177 So. 799 (1938).

portion to one year, or years, than to others of the same tenure in the absence of a prospective and definite showing that there will be a variation in value of the beneficial use."

Insofar as Gem's situation is similar to that of other BAWI industries, this Ruling means that the Internal Revenue Service will probably take the position that rentals paid by an industry under a BAWI lease contract must be spread ratably over the life of the assets where the industry has an option to renew the lease at the end of the primary term.

This Ruling would mean that the industry would be paying the contractual rental annually but would not be allowed to deduct, for income tax purposes, all of the payment as an expense of doing business.

To the contrary, the industry would be treated as if, in effect, it owned the building. The industry would not depreciate the property but would have to take the total amount of rent paid over the estimated life of the premises (for example 50 years) and deduct in a given year only one-fiftieth of the total amount of rent paid. This would mean that if a BAWI building has a reasonable life of 50 years and is leased with a primary term of 20 years at $10,000 rental per year with options to renew for successive periods at say $100 per year, the Internal Revenue Service would add the total payments during the primary term, which would be $200,000, to the payment for the next 30 years, which would be $3,000, getting a total of $203,000. The industry would then be allowed to deduct each year only $4,060 although during the first 20 years the industry is required by contract and by the policy of the State of Mississippi to pay $10,000 per year rent in order to fully pay for the improvements in the primary term.

Under this Ruling, the Internal Revenue Service is treating payments made by BAWI lessees as being like lump sum payments for the acquisition, assignment or cancellation of a lease.[6] The sums paid as rent are being prorated over the useful life of the premises even though the evidence shows that the rent paid is reasonable—that in no year does the rent exceed the fair rental value of the lease premises. Furthermore, in BAWI transactions, we have parties acting at arm's length. One important factor, as pointed out by the Fifth Circuit,[7] was the arm's length nature of the transaction. The Fifth Circuit stated—

"The R. F. C. was not an eleemosynary institution and was not in

[6]Cases cited by the Internal Revenue Service include the following: Wells Fargo Bank & Union Trust Co., 163 F.2d 521 (9th Cir. 1947); Home Trust Co., 65 F.2d 532 (8th Cir. 1933); Steele-Wedeles Co., 30 B. T. A. 841 (1934); Harriet B. Borland, 27 B. T. A. 538 (1933); Henry B. Miller, 10 B. T. A. 383 (1928); J. Alland & Bro., Inc., 1 B. T. A. 631 (1925).

[7]Benton v. Commissioner of Internal Revenue, 197 F.2d 745 (5th Cir. 1952).

> collusion with taxpayer to evade the income tax. It was attempting to protect itself in the transaction by a lease. In case of default in rent it would be easier to gain possession from a tenant than to foreclose or forfeit a contract to purchase and dispossess a purchaser . . . ."[8]

The Court went on to state that if the parties in good faith actually intended to enter into a lease contract, then the taxpayer up until the time that he exercised an option to purchase acquired no title to or equity in the property. The Court pointed out that the mere hope of exercising an option does not create an equity. In this case and in other cases[9] the Court sustained the right of the taxpayer to deduct as rent, payments made under a lease with an option to purchase. BAWI plants do not even have an option to purchase. BAWI factories cannot be said to be acquiring an equity in the premises, when under the laws of the State of Mississippi if they ever purchase these premises they must pay a fair and reasonable value for them above what has previously been paid as leasehold rental. Section 95 of the Mississippi Constitution of 1890 provides that lands belonging to or under the control of the State shall never be donated directly or indirectly to private corporations. Such lands must be sold for a fair and adequate consideration and Section 100 of the Mississippi Constitution of 1890 forbids the release of any obligation owned by the State.

Necessarily, in reaching the conclusion quoted above that the rents should be spread over the useful life of the premises, the Service must find that there is a reasonable certainty that the taxpayer will renew its lease at the end of the primary term of twenty years. Section 1,162-11-(b)(1) of the Regulations provides in part as follows:

> "Where there is a possibility that the lease may be renewed, the matter of spreading such costs over the term of the original lease, together with the renewal period or periods, depends upon the facts in the particular case, including the presence or absence of an unexercised option of renewal and the relationship between the parties. As a general rule, unless the lease has been renewed or the facts show with reasonable certainty that the lease will be renewed, the cost or other basis of the lease, or the cost of improvements shall be spread only over the number of years the lease has to run without taking into account any right of renewal."

The corresponding provisions of Section 39.23(a)-10(b) of Regulations 118 are substantially to the same effect. A number of cases have up-

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[8]Ibid.

[9]Breece Veneer & Panel Co. v. Commissioner of Internal Revenue, 232 F.2d 319 (7th Cir. 1956); Fishing Tackle Products v. Commissioner, 27 T. C. 638 (1957).

held deductions over the period of the original lease.[10]

The important factor in such a case is whether there is a reasonable certainty of renewal? Without a reasonable certainty of renewal, there is no justification for a requirement that leasehold rentals be amortized over the entire period of the lease. The Internal Revenue Service has again recognized the theory of a reasonable certainty to renew in I. T. 3366, C. B. 1940-2 at Page 65 where rental deductions were allowed after the Service found that the facts did not show with a reasonable certainty that the lease would be renewed.

The principles announced in the cases and rulings in determining the length of time over which improvements are to be amortized or depreciated under a lease containing a renewal option, should be equally applicable in determining whether the payments under the lease in the BAWI lease instances are in fact payments of current rent as contended by the taxpayers. Furthermore, the time to be considered[11] is the time when the contract was originally executed, not years later when the actual question of renewal comes up for final decision.

The factors used by the Internal Revenue Service in finding a reasonable certainty of renewal for Gem, Inc., are to a large extent applicable to all BAWI industries. The very fact that the A. & I. Board approved the industry in the first place is a factor being used against an industry's contention that there is no reasonable certainty of renewal. This was pointed out in the Ruling received by Gem as follows:

> "At the outset, it could hardly be denied that chances for the financial success of this enterprise were at least reasonably good if reliance may be placed on the judgment of those charged with the responsibility for its launching. Copies of documents received indicate that the Governor of The State of Mississippi acted in the capacity of Chairman of the Executive Committee of the Board of Directors of the Mississippi Agricultural and Industrial Board which was in active control of the BAWI program.
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> "In addition to the attention given by representatives of the State at the highest level of authority, numerous other responsible officers of the commonwealth, as well as the electorate of the particular subdivision involved were required to pass upon the desirability of establishing the business. Thus, there can be no question as to the qualifications of the responsible parties, nor that there was painstaking consideration and forethought given to its institution

[10]Bonwit Teller & Co. v. Commissioner, 53 F.2d 381 (2nd Cir. 1931); Halsam Products Co. v. Commissioner, 11 T. C. M. 87 (1952); 1620 Broadway Corporation v. Commissioner, 36 B. T. A 149 (1937).

[11]Benton v. Commissioner, 197 F.2d 745 (5th Cir. 1952).

particularly in view of the fact that failure would necessitate the levying of taxes by Marshall County to meet the bonded liability incurred for the venture's financing."

The Internal Revenue Service also considers the financial condition of the industry at the close of the taxable year involved.

There are many factors which enter into the continuation of a business, among which are the economic factors, including labor supply, payroll, etc. Under a BAWI lease the amount of the rent is only one, and certainly not the primary, consideration which will determine whether the options will be exercised. When a plant exercises a BAWI option and remains at what may seem to be a small rental, it must be taken into consideration that this plant is binding itself for a period of fifteen (15) to twenty-five (25) additional years to maintain a payroll in the community. Under the BAWI leases the entire transactions are handled at arm's length. The leases must be drafted so as to comply with the Constitution of the State of Mississippi and with the laws of the State and so as to meet the approval of the municipality and the approval of the A. & I. Board. By the time all of these bodies have been satisfied there can be no interdealing for individual advantage. And finally, suppose that the taxpayer is made to amortize over a forty (40) or fifty (50) year period rather than over the twenty (20) year period of a typical BAWI lease. This would mean that from approximately one-half to three-fifths of the total rental payments paid by the plant during the primary term of the lease would be deductible by the taxpayer in the final year that it operated the factory, should it finally decide not to exercise its option to renew. If a plant decided not to renew its lease, the probabilities are very great that it would have little or no income in that final year. In this case there would be little income against which to offset one-half to three-fifths of the total rental payment of the least which the taxpayer had not been allowed to deduct over the period of the lease.

One further question remains, and that is the effect of Section 15 of the Technical Amendments Act of 1958 on Mississippi's BAWI program. This Section amends Part VI of subchapter B of Chapter 1 (itemized deductions for individuals and corporations) by adding at the end thereof a new section:

"(a) General Rule. — Except as provided in subsection (b), in determining the amount allowable to a lessee as a deduction for any taxable year for exhaustion, wear and tear, obsolescense, or amortization—

"(1) In respect of any building erected (or other improvement made) on the lease property, if the portion of the term

of the lease (excluding any period for which the lease may subsequently be renewed, extended, or continued pursuant to an option exercisable by the lessee) remaining upon the completion of such building or other improvement is less than 60 percent of the useful life of such building or other improvement, or

"(2) in respect of any cost of acquiring the lease, if less than 75 percent of such cost is attributable to the portion of the term of the lease (excluding any period for which the lease may subsequently be renewed, extended, or continued pursuant to an option exercisable by the lessee) remaining on the date of its acquisition,

"the term of the lease shall be treated as including any period for which the lease may be renewed, extended, or continued pursuant to an option exercisable by the lessee, unless the lessee establishes that (as of the close of the taxable year) it is more probable that the lease will not be renewed, extended, or continued for such period than that the lease will be so renewed, extended, or continued.

"(b) Related Lessee and Lessor. — (Should not affect the BAWI Program.)

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"(c) Reasonable Certainty Test. — In any case in which neither subsection (a) nor subsection (b) applies, the determination as to the amount allowable to a lessee as a deduction for any taxable year for exhaustion, wear and tear, obsolescence, or amortization—

"(1) in respect of any building erected (or other improvement made) on the lease property, or

"(2) in respect of any cost of acquiring the lease, shall be made with reference to the term of the lease (excluding any period for which the lease may subsequently be renewed, extended, or continued pursuant to an option exercisable by the lessee), unless the lease has been renewed, extended, or continued or the facts show with reasonable certainty that the lease will be renewed, extended, or continued."

While the act apparently applies only to the construction of improvements made by a tenant as set out in subsection (a)(1) or to the cost of acquiring a lease as set out in subsection (a)(2), it is possible that BAWI leases might be construed by the Internal Revenue Ser-

vice to come under subsection (a) (2) as being payments made in acquisition of a lease. If so, the taxpayer is given not the burden of showing that there is no reasonable certainty of renewal but the burden of showing that the probabilities are in favor of non-renewal.

Subsection (c) as quoted above puts into the law what was formerly only in the Regulations.

AN ODDITY IN SALES LAW — THE SEARLES CASE

*Hector Currie**

Suppose that S contracts to sell and deliver a quantity of corn to B. Wishing his money without delay he arranges for the X Bank to discount his draft on B for the price. When the corn has been shipped, S brings the bill of lading to the X Bank and draws a sight draft for the agreed sum. (Either the draft will be drawn to the X Bank's order or if drawn to S's order it will be indorsed in blank; same for the bill of lading.) The X Bank takes the bill of lading and the draft, pays or credits to S the face amount of the draft minus a small discount, and forwards the draft, with bill of lading attached, to the Y Bank in B's city. The Y Bank presents the draft to B for payment. When B has paid the draft, he is given the bill of lading and he gets the corn. Suppose that the corn is defective in quality or deficient in amount and that B consequently has an action against S for breach of contract. Has he the same action against the X Bank? In Mississippi, within limits to be noticed shortly, the answer is yes.

According to Williston this "novel doctrine"[1] had its origin in *Landa v. Lattin*,[2] decided by the Texas Court of Civil Appeals in 1898; however, *Miller v. American National Bank*,[3] a Mississippi case decided a few weeks earlier, raised the same issue and reached the same result. It was held in the *Miller* case that the buyer had the same rights against the seller's assignee as against the seller "whether the bill of lading vested the title" in the assignee or not, but the short opinion stated no grounds for this conclusion. Four years later, in *Searles Bros.* v. *Smith Grain Company*,[4] the problem came up again. This time our Court endorsed the reasoning of *Landa* v. *Lattin* and adopted language to the effect that by taking the bill of lading the bank became owner of the goods and undertook performance of the seller's contract. At the end of a very long quotation from *Landa v. Lattin,* Chief Justice Whitfield added these words of his own: "We think the courts which have taken the other view have dealt with half the transaction—not the whole of it. They have looked to the draft, not to the bill of lading. They have failed to give every factor in the transaction its full significance, and to look through form to substance."[5] This statement suggests again that liability resulted from the taking of the bill of lading. But why should

*Professor of law, University of Mississippi.
1 2 Williston, Sales §435 (Rev. ed. 1948).
2 19 Tex. Civ. App. 246, 46 S.W. 48 (1898).
3 76 Miss. 84, 23 So. 439 (1898).
4 80 Miss. 688, 32 So. 287 (1902).
5 *Id.* at 699, 32 So. at 290.

the taking of the bill of lading have this effect? It is obvious that the bank got only a limited interest, for while "form" may suggest that the bank had absolute title, "substance" leaves no doubt that the bank took the bill of lading as it might in other circumstances have taken a mortgage or pledge. In other words, the bank did not buy corn from S and sell it to B in such a way as to authorize an inference that it was adopting S's representations; rather, it bought S's draft on B and took the bill of lading as collateral security for the draft. Accordingly, the *Searles* case itself seems an example of looking at half a transaction and basing a decision not on substance but on form.

There is another reason why the *Searles* case seems erroneous. The action is described in the report as an attachment in chancery[6] against Smith Grain Company, the seller; Exchange National Bank of Little Rock, Arkansas, which had bought the drafts; and two banks in Vicksburg which had presented the drafts to the buyer for payment and were retaining the proceeds as the Mississippi statute[7] directed them to do. Smith Grain Company did not answer. Exchange National Bank in its answer relied upon Rev. Stat. §5242 (1878)[8] providing that " . . . no attachment, injunction, or execution, shall be issued against such association [a National Bank] or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court." This statute was applicable[9] and it should have been controlling.[10] The Court, however, held that the action might proceed as the national bank was "a mere claimant of the fund"[11]—words explained in a later case as meaning that "the attachment was manifestly dealt with by the court as being primarily against Smith Grain Company."[12] But this explanation fails to convince. The national bank did not receive the drafts as agent for collection, it bought the drafts; consequently, the garnishee banks were indebted not to Smith Grain Company but to it. Smith Grain Company in this situation had nothing to be attached. The national bank was not "a mere claimant of the fund"—it was the only claimant.

Searles Bros. v. *Smith Grain Company* has been followed in later Mississippi cases[13] and described as "the settled law of this state."[14]

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[6]See Miss. Code Ann. §§2729-2734 (1942).

[7]Miss. Code §4300 (1892), Miss. Code Ann. §7881 (1942).

[8]12 U.S.C. §91 (1952).

[9]It includes garnishment in attachment. National Bank of St. Louis v. Stupp Bros. Co., 147 Miss. 747, 113 So. 340 (1927).

[10]*Cf.* First Nat. Bank v. Mississippi Cottonseed Products Co., 171 Miss. 282, 157 So. 349 (1934); Aldridge v. First Nat. Bank, 165 Miss. 1, 144 So. 469 (1932); National Bank of St. Louis v. Stupp Bros. Co., 147 Miss. 747, 113 So. 340 (1927).

[11]80 Miss. at 699, 32 So. at 290 (1902).

[12]National Bank of St. Louis v. Stupp Bros. Co., 147 Miss. at 757, 113 So. at 341 (1927).

[13]Citizens Bank & Trust Co. v. Harpeth Nat. Bank, 120 Miss. 505, 82 So. 329 (1919); L. Marks Sons v. West Tenn. Grain Co., 119 Miss. 465, 81 So. 162 (1919); Mobile Auto Co. v. Sturges, 107 Miss. 848, 66 So. 205 (1914).

[14]First Nat. Bank v. Tchula Commercial Co., 132 Miss. 58, 95 So. 742 (1923).

While continuing to hold that a bank discounting a seller's draft and taking a bill of lading as security becomes liable as "substituted vendor"[15] or "co-warrantor"[16] of goods described in the bill of lading when the draft is paid, the court has declined to extend this liability to other, unrelated shipments from seller to buyer.[17] The rule of the *Searles* case, moreover, was greatly limited in scope by the adoption of the Federal Bill of Lading Act (Pomerene Act).[18] This statute provides that a holder of a bill of lading for security who "in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or warrant the genuineness of such bill or the quantity or quality of the goods therein described."[19] It follows that in transactions across state lines, where the bill of lading was issued under the Pomerene Act, a discounting bank is no longer answerable for the goods.[20]

The result reached in the *Searles* case has been rejected by most courts that have considered the problem.[21] *Landa* v. *Lattin,* which furnished the basis for the *Searles* case, was followed for a time in North Carolina[22] and in Alabama.[23] The North Carolina court, however, changed its mind,[24] and the Alabama court later vitiated its decision by emphasizing[25] that the bank had in fact assumed the seller's obligation in the earlier case. Even *Landa* v. *Lattin* was overruled by the Supreme Court of Texas.[26] Mississippi seems to be the only jurisdiction where the doctrine still applies.

15Exchange Nat. Bank v. Searles Bros., 81 Miss. 169 at 173, 32 So. 314 (1902).

16L. Marks Sons v. West Tenn. Grain Co., 119 Miss. at 473, 81 So. at 163 (1919).

17Branham v. Drew Grocery Co., 145 Miss. 627, 111 So. 155 (1927); Colonial Lumber Co. v. Andelusia Nat. Bank, 138 Miss. 566, 103 So. 343 (1925); Exchange Nat. Bank v. Searles Bros., 81 Miss. 169, 32 So. 314 (1902).

1849 U.S.C. §§81-124 (1952).

19Id. §116. The same provision is found in Uniform Bills of Lading Act §37, 4 Uniform Laws Annotated 61, but UBLA is not in force in Mississippi.

20First Nat. Bank v. Tchula Commercial Co., 132 Miss. 58, 95 So. 742 (1923).

21Cases are collected in 2 Williston, Sales §435 n.16 (Rev. ed. 1948). There is a general recognition that banks do not intend to assume liability for goods and that to impose such a liability hampers the banking business. Banks could protect themselves through use of apt language in their indorsement of a draft and bill of lading, and if all were aware of the danger all would undoubtedly do so.

22Finch v. Gregg, 126 N.C. 176, 35 S.E. 251 (1900).

23Haas v. Citizens' Bank, 144 Ala. 562, 39 So. 129 (1905).

24Finch v. Gregg, supra note 22, was overruled by Mason v. Nelson, 148 N.C. 492, 62 S.E. 625 (1908).

25First Nat. Bank v. Wilkesbarre Lace Mfg. Co., 162 Ala. 309, 50 So. 153 (1909).

26S. Blaisdell Co. v. Citizens Nat. Bank, 96 Tex. 626, 75 S.W. 292 (1903).

REMEDIES AND PROCEDURE IN A TAX CASE

*Joe Crawford**

The amount of tax shown to be due on the return of a taxpayer is commonly referred to as a "self-assessment." This amount, corrected for mathematical errors, is assessed by the Director of Internal Revenue for the district in which the return is filed.[1] If a deficiency in income, estate or gift tax is detected under routine examination of incoming returns, it may neither be assessed nor collected, absent a situation in which the Director feels the revenue is in jeopardy, until the taxpayer has an opportunity for both administrative and judicial determination.[2]

When a return appears to be irregular, it is assigned to an internal revenue agent for audit. Some returns are selected for examination because of the large amount of income involved, and, others, because of obvious discrepancies. There is no substitute for a clear and adequate presentation of a transaction in the return. It takes less effort to convince the Internal Revenue Service that the return is proper on its face and should not be selected and sent to the field for audit than it will take to satisfy a revenue agent that there is no tax deficiency after the return has been assigned to him for examination.

Often advice from tax counsel is not sought until after the internal revenue agent has completed his investigation and issued a report setting forth his proposed findings of deficiency. There is need for competent tax advice from the moment the taxpayer is notified that his return is to be audited. The propitious time to win a tax dispute is in its beginning, before, in fact, it has become a dispute and during the examination of the return by the agent. Competent tax counsel may persuade the agent to accept a favorable theory at the inception of an examination. Less evidence is ordinarily required to satisfy the agent than is needed to satisfy his superiors, and than is necessary to prevail in court.

Almost every third case which reaches the courts today involves the civil fraud penalty. While the criminal sanctions of the Internal Revenue Code are not as frequently invoked, it is of little comfort to the taxpayer to be told that the government has the burden of proof in a fraud issue, and that, if he is indicted, the charge has to be proved beyond a reasonable doubt.

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*Formerly attorney in the office of the Regional Counsel, Internal Revenue Service, Chicago, Illinois.

[1]Int. Rev. Code §§ 6201 (a) (1) - 6213 (b), 26 U.S.C. §§ 6201 (a) (1) - 6213 (b) (1954).

[2]Ibid. at §§ 6213 (a) - 6216 (2).

When tax evasion is suspected a special agent of the intelligence division is near at hand. It is the duty of these agents to obtain evidence for prosecution in fraud matters. Their investigation is to be distinguished from a routine examination where a tax return is assigned to a revenue agent for the purpose of determing if the correct income has been reported. The special agent is adroit in his methods of investigation and it is often difficult to detect when he has entered the scene. His presence is not generally known until he has developed damaging evidence. Agents in the revenue service ordinarily present credentials showing their authority to make investigations. It is always wise to check an unknown agent's identity. A quick look at his pocket commission will reveal whether he is a revenue agent or a special agent.

It cannot be urged too strongly that prompt advice from a lawyer is needed when the taxpayer becomes suspect. At the investigative stage of a case, sound and effective representation can mean the difference between a prosecution or a civil claim for a deficiency, or neither. Without representation many taxpayers unwittingly waive their constitutional privilege against self-incrimination, and make false statements which are later used against them. Prior to 1951, taxpayers had the advantage of defenses which did not go to the merits of a case in the government's "health" and "voluntary disclosure" policies which were used to stave off criminal action. Today, the taxpayer's only defenses are embodied in the Fourth and Fifth Amendments to the United States Constitution and in the criminal law. Whenever it is felt that certain evidence might form the basis of an indictment, it should not be revealed except on concessions quid pro quo.

The taxpayer is afforded many conferences with administrative officials in both criminal and civil tax matters. These conferences can, and quite often do, turn into "fishing expeditions" both for the government and the taxpayer. Of course, the taxpayer's attorney will be better able to evaluate the merits of his case after such a conference, but the converse may be the result if he is not careful. This is especially so if the discussion involves either the civil or criminal aspects of a fraud charge. It is well for the attorney to remember that he, in most instances, knows more about the taxpayer's affairs than the government has been able to uncover. If criminal action is imminent, negotiations toward civil settlement are held in abeyance. This is so because it is felt by the government that any steps taken toward settlement of civil issues might prejudice the criminal case. Taxpayers most often would prefer to pay a large civil fraud penalty and forget the criminal sanctions. This is not possible under present policy.

Suppose that criminal proceedings are contemplated by the government. The taxpayer's lawyer may confer with the special agent and his group supervisor to convince them that they do not have sufficient

evidence to support a criminal conviction. If he is not successful, the special agent's report, recommending prosecution, will be transmitted for review to the chief of the intelligence division in the director's office. At this stage, the attorney may be able to persuade the agent in charge that the evidence is not sufficient to comprise all the elements necessary for a criminal prosecution. If the attorney is not successful at this juncture, the special agent's report will be forwarded by the chief of intelligence to the assistant regional commission, intelligence, for screening, and then to the regional office for the chief counsel of the Internal Revenue Service.

A conference may be arranged with the regional counsel's attorney in the enforcement division. If taxpayer's counsel is unable to convince enforcement counsel that the government lacks a prima facie case, the taxpayer's file will be sent to the criminal division of the Department of Justice. Again a conference may be advisable. Attorneys in this office review cases on a nation-wide basis and may be better able to determine overall weaknesses in the government's case. In the event the attorney in charge in the Justice Department decides to forward the case to the United States Attorney for the district in which the taxpayer resides with a recommendation for prosecution, there is still an opportunity to persuade the United States Attorney that he has a weak case.

Even if the United States Attorney is adamant, the grand jury may not vote a true-bill. A grand jury is not held accountable for its decisions and an indictment might not be voted by the jury. If an indictment is brought forth by the jury, the taxpayer's lawyer will have to use all his skills as an advocate to convince the jury in the federal district court that his client is innocent of criminal intent to evade taxes and that, if he is guilty of anything at all, it is owing the government some taxes which should be taken care of in a civil proceeding. Taxpayer's counsel might give some consideration to a plea of nolo contendere. Some judges are known to be lenient.

Assume that only civil tax matters are in controversy or that the criminal aspects of the case have terminated. What consideration must the tax lawyer give to his client's problems? He has certain alternative remedies and procedures which may be followed.[3] After completing his examination, the revenue agent will inform the taxpayer of his proposed findings and of any proposed overassessment or deficiency. The taxpayer may agree to the findings and sign a waiver allowing assessment and collection of the deficiency[4] or the acceptance of the proposed overassessment. A request for an informal hearing before

[3]Statement of Procedural Rules, Title 26, Code of Federal Regulations, Part 601 (1958 C.C.H. Standard Federal Tax Reports, Volume 5, Para. 5996 et seq.).

[4]Int. Rev. Code § 6213 (d), 26 U.S.C. § 6213 (d) (1954).

the agent's group supervisor may be made if the taxpayer does not agree to the agent's findings.

If a taxpayer fails to request a hearing before the group supervisor or disagrees with the decision reached by the agent's group supervisor after the hearing, a revenue agent's report, popularly referred to as an "R.A.R.," is issued. The revenue agent's report summarizes the agent's findings and sets forth any proposed deficiency. This report, of course, also may recommend an overassessment which is unacceptable to the taxpayer.

Occasionally, the taxpayer has been abrupt with the examining agent or failed to supply all the facts necessary to support his view. It is a mistake to treat revenue personnel curtly. When treated fairly, they have been known to point out errors made in the government's favor which would entitle the taxpayer to a refund.

The facts should never be misrepresented. Development of the facts to coincide with a tax theory is necessary, of course. Misleading statements and concealment of material facts, however, are never justified. A tax attorney has a duty to his client, to his profession, to his government, and to himself to be honest in his presentation of the facts. This does not mean that he is required to point out the bad facts, the agent will do that soon enough. Often it is better for the lawyer to bring such facts to light rather than to have them come out at an inopportune moment.

An index to a tax attorney's future success in tax negotiations is predicated upon the manner in which he has conducted himself before revenue personnel. He should keep this relationship on a high plane—a business-like basis. Attempts to gain good will through favors and gifts are embarassing to career employees and tend to create suspicion of motives. For the most part employees of the revenue service strive to find the correct answer to a tax problem. They are honest and try to do a good job for their government. It must be remembered, however, that employees of the revenue service are partisan in their attitude, and this is only natural since it is their job to protect the government's revenue. It will be difficult on occasions to convince them that there is any merit in the taxpayer's side of the case. They are only human and if the taxpayer or his counsel enters into negotiations with a "chip on his shoulder" or an air of superiority, opportunity for settlement is negligible.

If the taxpayer does not agree to the proposed deficiency after the hearing before the agent's group supervisor, he may file a formal protest with the office of the district director. This protest must be filed within thirty days after the date of the letter transmitting the revenue agent's report to the taxpayer and, for this reason, the letter of transmittal is commonly referred to as a "thirty day letter." After a protest

is filed, the taxpayer's case is transferred to the regional appellate division for the Commissioner of Internal Revenue. (When criminal prosecution is contemplated the case is not referred to the appellate division.) The hearing on the protest is informal and testimony is not under oath.

When an agreement is not reached after the taxpayer has filed a protest the assistant regional commissioner, appellate, will send a "notice of deficiency" by registered mail to the taxpayer's last known address.[5] If a protest was not filed the district director issues the statutory notice of deficiency. A taxpayer living in the United States has ninety days after the date of the deficiency notice in which to file a petition with the Tax Court.[6] For this reason, the letter transmitting the notice of deficiency is often referred to as a "ninety day letter."

Should a protest be filed with the appellate division? This is always a difficult decision. Technical advisors in the appellate division are chosen from agents in the field for their demonstrated ability in tax matters. They are skilled tax men. If a protest is filed, the technical advisor to whom the case is assigned may detect new issues which can be raised in the notice of deficiency, and, if this is done, the taxpayer will have the burden of proof on the issues so raised. It is also possible to increase the amount of deficiency without adding issues. Moreover, the notice of deficiency is prepared by the appellate division when a protest has been filed and is reviewed by the regional counsel's office. Thus, the explanatory paragraphs in the statutory notice which inform the taxpayer of the nature of and the basis of the deficiency are usually drawn with more care than if the notice had been prepared in the director's office.

New issues are seldom raised in the commissioner's answer when tax counsel has by-passed the appellate division and filed a petition with the Tax Court, because the government would then have the burden of proof. Nor is the amount of deficiency normally allowed to be increased after the statutory notice of deficiency has been mailed to the taxpayer.[7]

If a protest is filed and there is no settlement, the attorney in the regional counsel's office to whom the case eventually may be assigned for trial in the Tax Court will have the benefit of the taxpayer's written protest, the technical advisor's notes taken during conferences, and his report citing authority for the government's position. As a rule, a docketed case which is at issue will be dormant for many months awaiting the date of trial. The attorney for the commissioner has many cases assigned to him for possible trial. He, therefore, derives a distinct ad-

[5]Ibid. at § 6212 (b).
[6]Ibid. at § 6213 (a).
[7]Ibid. at § 6212 (c).

vantage in having this data to assist him over a long period of time.

For these reasons many practitioners prefer not to file a protest with the appellate division. Each case stands upon its own footing and no precise answer can be given as to when a protest should or should not be filed.

To the advantage of filing a protest it may be said that the primary function of the appellate division is to settle cases and the majority of tax issues are settled with them when a protest is filed. Most cases do not go to trial when the technical advisor has been presented with an offer in settlement adequately reflecting the merits of the case. Also, the filing of a protest will defer the time when a decision must be made to appeal to the Tax Court or make a claim for refund in the event the case is not settled.

If the controversy is not settled at the conference with the appellate division, or no protest is filed, the taxpayer must file a timely petition with the Tax Court or pay the amount of tax liability set forth in the statutory notice of deficiency. As an alternative to having his income, gift, or estate tax liability determined by the Tax Court, or as a means of obtaining a judicial determination of his liability for other taxes over which the Tax Court has no jurisdiction, such as excise and employment taxes, the taxpayer may pay the tax and sue for a refund.[8] (Although taxes other than income, estate and gift may be assessed and collected prior to administrative and judicial determination, collection efforts are usually not attempted until the taxpayer has had an opportunity for administrative hearing.) If a claim for refund is timely filed with the district director, suit for recovery of the tax may be brought either in the United States District Court or the United States Court of Claims. Although concurrent jurisdiction exists, jury trials are available only in the district courts.

When tax litigation cannot be avoided, the selection of an appropriate forum for a hearing must be made. The early choice of the proper court for adjudication of the issues involved is important. (This problem should be given consideration prior to administrative hearing.) In making the selection, tax counsel must carefully read and analyze the decisions of the Tax Court, the Court of Claims, and the District Court and Court of Appeals. He must also find if the Supreme Court has reviewed any of the issues involved in his case. His choice will, of course, be predicated upon favorable cases and precedent.

Unless the Supreme Court has overruled a tax court decision, it may have more weight as a precedent than a decision of the District Court or Court of Appeals. This is possible because the tax court specializes in tax disputes and its jurisdiction extends throughout the

[8]Ibid. at § 7422.

United States. Opinions of District Courts and Courts of Appeals are controlling only in their respective jurisdictions. Although a tax court case may be reversed on appeal by one of the Courts of Appeals, its holding may still retain efficacy in jurisdictions where the particular issue has not been appealed.

The government is represented by the regional office of the Chief Counsel of the Internal Revenue Service in conjunction with the appellate division when the case is docketed in the Tax Court. An attorney in the regional counsel's office, to whom the case is assigned for trial, attends settlement conferences. It is the concurrent responsibility of the appellate division and the regional counsel to settle cases after they have been docketed in the Tax Court. If they are unable to agree upon the basis of settlement, the conflict will be resolved by the Chief Counsel. This is a change in settlement procedure which became effective May 1, 1958.[9] Formerly such conflicts, which were few, were resolved jointly by the Commissioner of Internal Revenue and the Chief Counsel. Also, under the new procedure, sole settlement authority is in the regional counsel after the opening session of court. This change is expected to facilitate the settlement of cases inasmuch as the trial attorney is often in a better position to evaluate the evidence.

In order to create a firm foundation for settlement, the taxpayer's attorney must convince the technical advisor and the appellate counsel, during settlement negotiations, that he has competent evidence and will be able to present it well in court. He should be careful not to create the impression that he does not like to try cases or that he will always settle before going to court. Many good settlements have been obtained as late as the eve of the trial. When the tax controversy is settled before hearing, the Tax Court will enter its order based upon the settlement.

If the lawyer does not do his part ably at the administrative stage, there is no assurance that he will have a chance to retrieve his error in court. Tax litigation is expensive. The most important service, therefore, that the lawyer can render to his client in a tax case is to bring the controversy to a successful, early conclusion without the risks and cost of trial.

[9]Comm. Del. Order No. 60 (Chief Counsel's Order 1958-5), issued April 17, 1958.

State Bar Section

THE LAWYERS AND THE COURTS†

*W. N. Ethridge, Jr.**

The Court and the Bar are old and indispensable friends. I say this first in a personal way. Some of us were classmates in the Ole Miss Law School in the mid-1930's. The mutual search for truth by teacher and student creates a warm friendship. Some of us started that adventure in the Law School too many years ago. And I have known all of you in and out of Court on many occasions, pleasant to me and I hope to you. So I am grateful for your hospitality and for the high professional standards of the Bars which you represent.

The law is made by the Bar even more than by the Bench. The learning, high sense of honor, and varied gifts of the many outstanding lawyers in Mississippi history have given the Bar of this State a reputation throughout the whole domain of the common law. Of course, the World has had its fling at lawyers and at the Courts. It never pays in an appellate argument to attack the trial judge whose opinion is being reviewed, but I heard one attorney start his argument by saying, "This is an appeal from a judgment by Judge A, but there are numerous other good reasons for reversal." Sometimes the judge may abruptly indicate conclusions which tempt a lawyer to reply as one did in my own County of Lafayette. He had barely stated his contentions when the judge said: "There is nothing to your proposition—just nothing to it." The lawyer drew himself up and said: "Your Honor, I have worked on this case for six weeks and you have not heard of it twenty minutes. Now, Judge, you are a lot smarter man than I am, but there is not that much difference between us."

The officers of your District Conference of Local Bar Associations assigned me the topic of the role of the lawyer in society and particularly in the Courts. Now you all know the cautious lawyer who draws his pleadings in such a way that when he comes to trial he will have freedom of action with no issues closed — like the man who denied that his client was the father of said twins or either of them. I wanted to keep for myself full freedom of action, and the suggested subject permits me to say anything without being called to order for irrelevance.

The role of the lawyer in the Courts and the interdependence of

†An address delivered to the District Conference of Local Bar Associations in Clarksdale, Mississippi, on the night of October 9, 1958.

*Associate Justice, Supreme Court of Mississippi, and former professor of law, University of Mississippi.

the Bar and the Courts are so manifest on the surface that one could be accused of temerity in attempting an analysis of the obvious, but life and the complex relations in it are in fact never obvious and easy. It is like an iceberg with a small visible peak above the rolling seas, but the massive, meaningful and sometimes dangerous structure below the waves. The search for truth and for justice, one of the great pursuits of man on this earth, is the joint task of lawyers and Courts. I want to spend the time alloted to me in discussing with you, first, the meaning and functions of the profession of law in the administration of justice through the Courts. And secondly, looking beneath the surface of contemporary problems in the administration of justice are questions and dangers which members of our profession should recognize and consider. I can offer few, if any, solutions, but I would like to think with you about some of these issues which we must identify and face. No problem in life is insoluble to men of good will, who approach it intelligently, knowledgeably, and with faith in God.

I

"Under a government of laws the lives, the fortunes, and the freedom of the people are wholly dependent upon the enforcement of their constitutional rights by an independent judiciary and by an independent bar. The legal profession is a public service."[1] Lawyers are public servants and officers of the Courts. They are the stewards of the legal rights and obligations of all citizens.

According to Dean Roscoe Pound, "a bar association is an association of persons practicing the profession of law formed and maintained to promote the administration of justice according to law and to promote and uphold the purposes and spirit of that profession."[2] What do we mean by a profession? What are its purposes and spirit? Economic necessity requires us to gain a livelihood and to direct our activities in that direction. In all walks of life, man must bear this in mind, and in business and trade it is the primary purpose. However, it is an incidental purpose in a profession. A profession such as the ministry, law, medicine, and teaching means much more than a calling which has a certain traditional dignity. The term "refers to a group of men pursuing a learned art, as a common calling in the spirit of public service." There are three items involved in a profession: Organization, learning, that is, pursuit of a learned art, and a spirit of public service. The idea of gaining a livelihood is involved in all callings, but, as distinguished from trade, in a profession it is incidental. Learning is one thing which distinguishes a profession from a calling or vocation, or occupation. This pertains not only to the nature of the art, but professions "his-

[1]Pound, The Lawyer from Antiquity to Modern Times (1953), p. vii.
[2]Pound, ibid., p. 4.

torically have a cultural, an ideal, side which features the exercise of that art." The essence of a profession is that it is practiced in a spirit of public service. A trade aims primarily at personal gain, a profession at service to the public. This spirit of public service is a prerequisite of a sound administration of justice according to law. The other two elements of a profession, organization and pursuit of a learned art, secure and maintain that spirit.

The late Chief Justice Arthur T. Vanderbilt of New Jersey once classified "the five functions of the lawyer."[3] All of them relate to and affect the Courts.

(1) The lawyer is a "wise counselor to all manner of men in the varied crises of their lives when they most need disinterested advice." This requires a thorough knowledge of legal principles and how they operate, a wide knowledge of human nature and of modern society, and an ability to forecast the trends of the law. The courts must rely upon counsel advising their clients adequately and carefully. Failure to do so is reflected in the evidence and issues presented to the court.

(2) The great lawyer is also "a skilled advocate trained in the art of prosecuting and defending the local rights of men both in the trial courts and on appeal." Experience as an advocate is necessary in order for the lawyer to evaluate his client's cause as it may develop in the courtroom. Advocacy involves several distinct arts which must be studied and mastered. Of course, here it is that the lawyer's most direct connection with the courts exists. As an officer of the court, the lawyer must present his client's position thoroughly and effectively. The courts could not operate efficiently without that essential contribution.

As Mr. Justice Jackson noted, the lawyer throughout the history of this nation has been an essential American institution. He understands the structure of society, and how its groups relate to each other, because he lives in a community in which he can keep it all in view. He resolves problems by first principles. He takes his obligations seriously and fights his case for a client with all available resources. In that tradition, if he lost in the trial court, he appealed. If he lost there, "he joined the client at the tavern in damning the judge — which is the last rite in closing an unsuccessful case, and I have officiated at many. But he loved his profession, and had a real sense of dedication to the administration of justice, he held his head high as a lawyer, he rendered and exacted courtesy, honor and straightforwardness at the Bar."[4]

[3]Vanderbilt, The Five Functions of the Lawyer, 40 ABAJ 31 (1954); reprinted in the Lawyer's Treasury, edited by Eugene C. Gerhart (Anthology from ABAJ, 1956), p. 211.

[4]Jackson, The County-Seat Lawyer, 36 ABAJ 497 (1950); reprinted in the Lawyer's Treasury, supra p. 50, 52.

(3) Another task of the lawyer "is to do his part individually and as a member of the organized Bar to improve his profession, the courts, and the law." President Theodore Roosevelt said, "Every man owes some of his time to the upbuilding of the profession to which he belongs." Here again the lawyer is closely related to the courts, because without an active and forward-looking organized Bar, the courts would wither on the vine.

(4) The lawyer must also act as an "intelligent, unselfish leader of public opinion within his own particular sphere of influence." The lawyer is not only a practical man but a thinking man. He has a duty to use that God-given power and training as a leader of public opinion. In this respect the lawyer's function with reference to the courts is less obvious but it exists. He should use his influence as a leader of public opinion to see that the law and the courts retain our traditional principles but also keep pace with the times, and to insure that the Courts are staffed by competent and honorable men.

(5) The lawyer "must be prepared, not necessarily to seek public office, but to answer the call for public service when it comes." Much of the membership of the Constitutional Convention, and of the legislature and other government officers throughout our history have been lawyers. The unselfish holding of public office has always been one of the finest traditions of the legal profession. It affects directly the administration of justice and personnel of the Courts.

All five of these functions of the lawyer — counseling, advocacy, improving his profession, the courts and the law, leadership in molding public opinion, and the unselfish holding of public office — are closely connected with the Courts in many respects. The Bar and the Bench mutually support and rely upon one another. The absence or inadequacy of one might mean the failure of the other.

The lawyer has a double duty to his client and the law. He must do his best for the one, but not at the expense of the other. He must have intellectual ability. He must have integrity, and not just economic integrity, but that of the intellect. Do not shirk awkward facts because they raise difficult problems. You should recognize that there is some weakness in your case and squarely and candidly meet it. I used to say, when I was in the practice, that I made three arguments of every case. First came the one that I had planned — as I thought, logical, coherent, complete. Second was the one actually presented — interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night.

II.

It is an exciting time to be alive. The danger to human flesh has

never been greater than today. But about no earlier period in history could it be said that the earth could be made sufficient for all of its people. The expanding economy of our beloved nation and the opportunities it offers, material, cultural and spiritual, to develop our land for the best interest of all the people, forecast a bright future. But we must be willing now to accept the claim upon us for the generations to come.

Problems and dangers journey along with opportunities and challenges. This is true of the legal profession, including both the Bar and the Bench. They are the stewards of the legal rights and obligations of citizens. Some of these problems and issues can be identified.

One threat to the idea of a profession is in the "increasing bigness of things in which individual responsibility as a member of the legal profession is diminished or even lost."[5] Economic pressure can make the money-making aspect of the calling the primary or even the sole interest. We must make every effort to remember the great traditions in our custody, and to imbue the younger members of the Bar, and law students, with the idea that the law is a profession characterized by learning and a spirit of public service.

The past twenty-five years have seen the rise in this country of the welfare or service state, which tends to take over services rendered by the professions and replace it by service performed by administrative agencies or bureaus. The efficient administration of our complicated federal and state governments makes necessary the use of administrative agencies, but the Bar should see to it that the individual citizen does not become a mere social security number. When his rights are to be affected by an administrative decision, he should have the right to be represented by a lawyer and to have a full and fair hearing prior to decision. Administrative law may supplement but should not supersede the judicial function in determining the rights of citizens. In my opinion, there is a real need in Mississippi for the Bar to make a critical analysis of the work of administrative agencies, and to support the enactment, based upon such a study, of a uniform administrative procedure act.

Many callings other than the traditional professions are endeavoring to become professions, although they do not profess a learned art and are primarily money-making in purpose and spirit. The desire to elevate the standards of business and of all callings is praiseworthy, but, in elevating these, we should be vigilant to see that the purpose is not achieved by pulling down the standards of the legal and other established professions. I do not think that within our lifetime lawyers will face the same danger of state supervision and control with which

[5]Pound, op. cit. supra note 1, p. 354.

the medical profession is threatened in the field of socialized medicine. However, England now has an optional system of socialized legal service, as well as socialized medicine. Of course, effective service to the public by a profession cannot be had by state organized and supervised activities. We must be sure that our profession is maintaining its high standards of conduct and service, in order to preclude even the beginnings of what has happened in England with reference to medicial and legal service.

Our profession is not sufficiently vigilant and active in developing a program to improve the administration of justice in the courts. Procrastination is one of the main obstacles. If we are not careful we will get ourselves into the position of the Baptist preacher who had used a lot of big words in his sermon and displayed a special fondness for "procrastination", a word which he rolled off his tongue often, and almost as often in an inappropriate place. A learned member of the congregation, suspecting the parson didn't know what he was saying, pressed the latter after the service for a definition of "procrastination." The preacher had to admit he could not give an immediate, accurate definition, but firmly declared it to be "one of the fundamental doctrines of the Baptist church."

My assigned time does not permit, and you would not be receptive to, any detailed discussion of the need to modernize some of our judicial functions. But certainly it can be said that the Bar and the Bench in the state should carefully consider and adopt an active program directed toward creating a judicial council, which would serve continually as an independent critical agency of our court system and would make recommendations and suggestions for its improvement. Among other problems which such a body could consider, along with the Bar, would be (1) the need for a continuing, current statistical survey of the work of all of the courts in the state; (2) the improvement of our jury system; (3) the improvement of our justice of the peace courts, or the substitution for them of a county court system; (4) the revision of our divorce laws, with the objective of reducing the rate of divorce and of enabling the courts to consider more carefully the individual marriage problems of each couple, with the purpose of enabling the marriage to continue; (5) a revision of our rules of practice and procedure in all of the courts, particularly with a view to making them more uniform and modern, including procedures for pre-trial discovery and pre-trial conferences; and (6) the improvement of the administration of criminal justice in the state, with particular reference to modernizing those procedures, improved crime detection, juvenile delinquency, and traffic laws and administration.

The remedies in these respects are relatively simple, and have

been clearly demonstrated by experience in other states. They are important to all of us if our kind of government is to function as it should.

Mr. Justice Holmes once said: "Historical continuity is not a duty, it is a necessity." The great ideal of western civilization, which stemmed from the Greek philosophers, was of moderation in all aspects of life and behavior. The Golden Mean, moderation, is assuredly a guide for life in a democracy. Yet the major domestic crisis of our time, affecting the balance of powers between the federal and state governments, has arisen because of the lack of historical continuity and moderation in recent federal court decisions. The American Constitution not only distributes the power of government, but seeks to lay down general principles to insure the just exercise of those powers. This is an important contribution of our nation to political science. The federal-state relationship has always been complex and difficult. Recent decisions impinge upon the spirit of local self-government, which has been a vital force in shaping our democracy from its inception. The recent Report of the Committee on Federal-State Relationships As Affected by Judicial Decisions, approved in August, 1958, by the Conference of Chief Justices, with a substantial majority of the chief justices from states all over the nation voting for it, reflects a growing concern among the Bench and Bar over the danger of abrogation by the federal courts of the essential nature of our federal system.

This problem transcends the important school segregation cases, and extends into many fields, such as the use of the general welfare clause, grants-in-aid, the doctrine of pre-emption, labor relation cases, state law in diversity cases, taxation, state legislative investigations, admissions to the bar, and state administration of criminal law. Certainly the overall tendency of federal decisions over the last twenty-five years or more has been to press the extension of federal power and to press it rapidly. The court has too often adopted the role of policy-maker without judicial self-restraint. Certainly no more important obligation rests upon it than that of careful moderation in the exercise of its powers. The lack of moderation and a sense of historical continuity has resulted in the present domestic crisis.

Judge Learned Hand commented many years ago that "a society so riven that the spirit of moderation is gone, no court *can* save; that a society where the spirit flourishes, no court *need* save . . . What is the spirit of moderation? It is the temper which does not press a partisan advantage to its bitter end, which can understand and will respect the other side . . . . If you ask me how such a temper and such a faith are bred and fostered, I cannot answer . . . . Men must take that temper and that faith with them into the field, into the market place,

. . . they cannot be imposed; they must be lived. Words will not express them; arguments will not clarify them; decisions will not maintain them."[6]

Assuredly, it is unfortunate when a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seemed to him to be first principles are believed by half his fellowmen to be wrong. For myself, it would be "irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."[7]

This vital problem of federal-state relationships represents the major domestic crisis of this century. We as lawyers and judges should maintain our sense of balance and use our training and experience in preserving the traditional distribution of powers in the republic.

The problems and issues which I have touched upon present a challenge to the Bar and the Bench. Let us all work toward dealing constructively and effectively with them.

I conclude with Daniel Webster's toast: "The Law: It has Honored Us, May we Honor It."

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[6]Hand, The Contribution of an Independent Judiciary to Civilization, an address delivered in 1942 and printed in Jurisprudence in Action, A Pleader's Anthology (1953), p. 223, 234-235.

[7]Hand, The Bill of Rights (1918), p. 73.

THE POWER OF THE SUPREME COURT OF THE UNITED STATES†

*Charles C. Evans**

There comes a time in the sequence of events in every government when questions arise which vitally effect the stability or the successful functioning of that government. The question of the Federal Judiciary and its powers is, at present, confronting the people of the United States. The power of the Supreme Court to declare acts of Congress unconstitutional by a five or four vote of the Supreme Judges is indeed one of the most pressing questions before the people at this time. It is a question of grave importance to our people, and one which should be considered from every viewpoint before arriving at a definite decision.

It cannot be denied by those who are interested in governmental affairs that some of our people are of the opinion that we are being ruled by a Judicial Oligarchy rather than by the will of the people, expressed through their duly elected representatives. There are some who contend that the Supreme Court with its power should be maintained inviolate as it now functions. There are others who maintain the idea that the power to declare acts of Congress unconstitutional should be exercised only by a seven to two vote of the Judiciary. There are still others, with whom I agree, who contend that the sovereignty of the people should be preserved by recalling this power, which has not been granted to the judiciary by the Constitution.

The Supreme Court of the United States was provided for by the fifty-five men who met on the second Monday in May, 1787, at Philadelphia for the purpose of revising the Articles of Confederation. This meeting was in response to a call from a previous convention of delegates from five of the states, called at the instance of the Legislature of Virginia to take into consideration the subject of uniform trade regulations among the states, the lack of which had come to be one of the chief evils of the Confederation. Although fifty-five members sat in this second convention, only thirty-nine signed the Constitution.

It was in this convention that our present Constitution, without the amendments, was drawn up, and later ratified by all of the states in spite of the powerful oppostion of Patrick Henry, Mason, Lee, and others. During the Confederation, the national government was dependant for the most part on the states for the enforcement of its will.

†This was a student paper written in 1923 for submission to Judge T. C. Kimbrough, then Dean of the University of Mississippi Law School.

*Attorney at Law, Laurel, Mississippi.

The Articles of Confederation had made no provision for a federal judiciary.

The purpose of the federal judiciary was to give *force* to the orders of Congress in case of disobedience by either individuals or states. Notice that the original purpose of the judiciary was to give *force* to the acts of Congress, not to *defeat* them. The jurisdiction of the Federal Court was restricted to questions of national interest and to those involving the peace and tranquility of the Union, such as disputes between the states themselves and between the citizens of different states. The jurisdiction of all other controversies was left to the determination of the courts of the several states. The Constitution provides directly only for the Supreme Court and indirectly for the inferior courts, leaving the number of the Judges to be determined by Congress.

The Supreme Court was originally organized by Congress in the Judicial Act of 1789, and was composed of six Judges. Under its present organization the Court is composed of nine Judges, one of whom is chief. These are appointed by the President, subject to confirmation by the Senate, and hold office for life or during good behavior. Their powers are chiefly appellate and they are seldom called upon to exercise the original powers. The most of their attention is occupied with questions of constitutional law and passing upon the validity of legislative acts, either of Congress or of the state legislatures.

Of the various powers exercised by the federal judiciary, one stands out with striking clearness as preeminent. This is the power of the Supreme Court to declare acts of both the state legislatures and of Congress unconstitutional. The tremendous significance of this power is manifest. It gives to the Supreme Court of the United States a position that is unique among the judicial tribunals of the world. In none of the other countries of Europe, not even in Bolshevistic Russia, is there a court with the authority to set aside an act of the legislature on the ground that it is not in harmony with the constitution. It is true, some of the newer states in other parts of the world have adopted this American practice to a greater or lesser degree. No other feature of the government of the United States has excited such deep interest among students of government. It is universally admitted to be of profound importance.

Having given a brief history of the formation of the Supreme Court, we now come to the most important phase of our subject; namely, where did the Supreme Court get the authority to exercise this power? It is a fact of great interest that the Constitution does not confer upon the Supreme Court the power to declare an act of Congress unconstitutional. There is in the Constitution no reference whatever to the constitutionality of laws. When it was proposed, in the

Constitutional Convention, to give the Federal Supreme Court even a limited veto upon acts of Congress, the convention *not once, but four times,* refused to confer this power. (Madison's Journal as printed in Elliot's Debates, Vol. 5, p. 428.)

According to Allen L. Benson in "The Usurped Power of the Courts," p. 5, the man who really made the Constitution, in the sense that his brain supplied all of the distinctive features that differentiated it from all other federal constitutions, was Pelatiah Webster. He was a relative of Daniel and Noah Webster, a graduate of Yale, a financier and economist; yet for a hundred years he was almost forgotten. Hannis Taylor, diplomat and historian, brought to light the real facts concerning Webster in his works on the origin and growth of the English and American constitutions.

On February 16, 1783, Pelatiah Webster published in Philadelphia a pamphlet entitled, "A Dissertation on the Political Union and Constitution of the United States which is necessary to their Preservation and Happiness." In this pamphlet, an original copy of which is in the Library of Congress in Washington, Webster urged the necessity of calling a convention to draft a new constitution and outlined, at length, the kind of constitution he favored. It is interesting to note that even though he outlined a new constitution at least four years before the assembling of the convention, Webster was not a member of that body. However, his fundamental, revolutionary ideas of a federal government were placed before the convention in each of three of the plans presented to that body. They were in the plans of which Madison, Pinckney, and Hamilton were regarded as the authors. They are in the present Constitution of the United States.

Hannis Taylor enumerates them in "The Origin and Growth of the American Constitution," p. 172, as follows:

> "A federal government with independent powers of taxation.
> The division of the federal head into three departments—the legislative, executive and judicial.
>
> The division of the federal legislature into two branches.
>
> A federal government with delegated powers operating directly upon the citizens, the residuum of power remaining in the states."

Webster, in his draft of a constitution, did not say much about the courts. He advocated the establishment of a federal judiciary, but did not suggest that it should have power to invalidate acts of Congress. However, we may infer his meaning by quoting from his famous pamphlet of 1783:

"Laws or ordinances of any kind (especially of august bodies of

> high dignity and consequence) which fail of execution, are much worse than none; they weaken the government and expose it to contempt . . . . I propose that any state may petition Congress to repeal any law or any decision they have made, and if more than half of the states do this, the law or decision should be repealed, let its nature or importance be however great, excepting only such acts as create funds for the public credit . . . . If every act of Congress is subject to this repeal, Congress itself will have stronger inducement, not only to examine well the several acts under their consideration, but also to communicate the reasons for them to the states, than they would have if their simple votes gave the final stamp of irrevocable authority to their acts."

Briefly reviewing the attempts of the convention to embody in the constitution a clause which would grant the judiciary the power to nullify acts of Congress, we will only consider the plans of Alexander Hamilton and James Madison as they are pertinent to the issue.

In his plan Hamilton proposed that the President and Senators be elected for life, that the President should appoint the governors of the states; that both the President and the Governors should have an absolute veto over acts of Congress which were unconstitutional. This plan was "praised by everybody, but supported by none." (Yate's Minutes of the Convention, Elliot's Debates, Vol. 1, p. 431.) This expression of his views was too bold; the people would never ratify such a constitution.

Madison was too cautious to go directly to the accomplishment of his purpose. He offered the following resolution to the convention:

> "Every bill which shall have passed the two houses shall before it becomes a law, be severally presented to the President of the United States, and to the Judges of the Supreme Court for the revision of each. If upon such revision, they shall approve of it, they shall respectively signify their approbation by signing it; but if, upon such revision, it shall appear improper to either, or both, to be passed into a law, it shall be returned, with the objection against it, to that house in which it shall have originated, who shall enter the objection at large upon their journal, and proceed to reconsider the bill; but if after such reconsideration, two-thirds of the house, when either the President or a majority of the Judges shall object, or three-fourths where both shall object, shall agree to pass it, it shall, together with the objection, be sent to the other house, by which it shall likewise be considered, and if approved by two-thirds or three-fourths of the other house, as the case may be, it shall become a law." (Madison's Journal as printed in Vol. 5, p. 428, Elliott's Debates.)

Then the struggle over the judiciary began. The vote on Madison's resolution was postponed as a result, on Monday, June 4, of a motion by Elbridge Gerry, who desired to offer a resolution giving the President an absolute veto. The convention voted unanimously against it, and by a vote of 8 to 2, gave the President the limited veto he now exercises.

Madison's plan to give the Supreme Court a limited power was revived two days later by James Wilson (of Pennsylvania), who moved a reconsideration of the vote on the resolution. Again it was defeated, by a vote of 8 to 3. On August 15, Madison again made an attempt to incorporate his plan in the constitution, and it was finally voted down 8 to 3. (Madison's Journal, Vol. 5, p. 428, Elliot's Debates.)

When Gouverneur Morris had completed the writing of the Constitution as adopted by the convention, it was submitted to the members for their signatures. It is significant that out of the fifty-five delegates present only thirty-nine signed the Constitution. The other members of the convention refused to sign the document for one reason or another, but their refusals were neatly covered up by Morris in the phrase he appended to the Constitution:

> "Done in convention by the unanimous consent of the states present."

On September 17, with all of the records under lock and key, the Constitution was sent to the Continental Congress for its approval (Secret proceedings of the Federal Convention, pp. 188-189, published in 1909 as United States Senate Document, No. 729.)

Prior to the Revolution, no colonial Supreme Court ever dared to set aside the act of a legislature. Professor Cooley, in "Constitutional Limitations," Sixth edition, p. 193, declares:

> "The first law ever invalidated in America upon the ground of its constitutionality was the act involved in the case of Trevett vs. Weeden, which was decided in the Superior Court of Judicature of Rhode Island in September, 1786. A few months later the Judges, all of whom were elective, were kicked out of office by the legislature."

By the time that the constitutional convention met in 1787 to frame the present national constitution, the courts of five states were beginning to claim the power to declare acts of the legislature unconstitutional. The Courts of the states that claimed this power did not at first exercise it. The Virginia Court of Appeals, as early as 1782, expressed the opinion that "the court has the power to declare any resolution or act of the legislature, or of either branch of it, unconstitutional and void." But the court kept this conviction in the form of an opinion for

several years. In 1787, in *Bayard v. Singleton,* the Supreme Court of North Carolina exercised this power. The people denounced the Court and the Judges as described in Coxe, "Judicial Power and Unconstitutional Legislation," p. 252,:

> "The judges were fiercely denounced as usurpers of power. Spaight, afterward governor, voiced a common notion when he declared that 'the state was subject to three individuals who united in their own persons the legislative and judicial power, which no monarch in England enjoys, and which would be more despotic than the Roman triumvirate and equally insufferable!' "

Professor J. Allen Smith in "The Spirit of American Government," p. 90, says:

> "In eight of thirteen states, the doctrine that the judiciary could refuse to enforce laws regularly enacted by the legislative body had not even been asserted by the courts themselves, much less recognized and accepted by the people generally."

Gouverneur Morris, who claimed to have written the Constitution with his own hand, gave it away when he wrote a letter to Timothy Pickering, under date of December 22, 1814, (Elliot's Debates, Vol. 1, p. 506), in which he said:

> "That instrument [referring to the Constitution] was written by the fingers which write this letter. Having rejected redundant and equivocal terms, I believe it to be as clear as our language would permit; excepting, nevertheless, a part of what relates to the judiciary. On that subject, conflicting opinions had been maintained with so much professional astuteness that it became necessary to select phrases which, expressing my own notions, would not alarm others . . . ."

Later:

> "You have made a good Constitution," said a friend to Morris after he returned from the Convention. "That," replied Morris, "depends on how it is construed." (Gordy, Political Parties in the United States," Vol. 1, p. 114).

Black's Constitutional Law, third edition, pp. 75-76, says:

> "A Constitution is not to be interpreted on narrow or technical principles, but liberally and on broad general lines, in order that it may accomplish the object of its establishment and carry out the great principles of government . . . . It is a cardinal rule in the interpretation of Constitutions that the instrument be so con-

strued as to give effect to the intention of the people, who adopted it. This intention is to be sought in the Constitution itself, and the apparent meaning of the words employed is to be taken as expressing it except in cases where that assumption would lead to absurdity, ambiguity or contradiction."

At the February (1800) term of the United States Supreme Court, Mr. Justice Chase, in deciding the case of *Cooper v. Telfair,* said:

"Although it is alleged that all acts of the legislature in direct opposition to the prohibitions of the Constitution would be void, yet it still remains a question where the power resides to declare it void." 4 Dallas 19.

But the man who was both to claim and to seize this power for the Court was already coming, and, the next year, took his seat at the center of the bench—John Marshall. He became Chief Justice in 1801. His appointment was one of President John Adam's last acts.

As the Chief Justice of the United States Supreme Court, he created, by the rendition of the opinion in *Marbury v. Madison,* the greatest Court that the world has ever seen. A court that had never existed anywhere until Marshall's time, and has never existed anywhere else since his time. A court not chosen by the people, that destroys or re-writes laws enacted by the people. A COURT THAT DERIVES ITS OWN GREAT POWERS FROM LINES THAT THE COURT ITSELF READS INTO THE CONSTITUTION – LINES THAT MEN WHO MADE THE CONSTITUTION REFUSED TO PUT INTO IT. And, though Marshal has been dead about ninety years, his brain and his will go marching on. Moreover, Marshall dead is greater than ever was Marshall living. In his life time, the United States Supreme Court exercised powers over only a few millions of people, all on the fringe of one continent. Now the Court exercises powers over one hundred million human beings, some of whom are in the far corners of the sea.

Yet John Marshall, in his early manhood, scorned or pretended to scorn, the great principles for which he afterwards fought. In those days he did not believe the Supreme Court had the inherent right to destroy acts of Congress. He said the Constitution gave the Court no such power. His own words are:

"The legislative authority of any country can only be restained by its own municipal constitution; this is a principle that springs from the very nature of society, and the judicial authority can have no right to question the validity of a law unless such jurisdiction is expressly given by the Constitution." *Ware v. Hylton,* 3 Dallas 211.

But when he thus spoke, John Marshall was not a Judge; he was a lawyer appearing in a case before the Supreme Court. He had not felt the tug and pull of the legal maxim, "It is the office of a good judge to enlarge his jurisdiction." When his opportunity came to exercise power, he made the most of it. He was Chief Justice of a Court that, as Jefferson said, was "advancing its noiseless step like a thief over the field of jurisdiction."

In the light of the foregoing facts, gathered from the various authorities, there cannot be any doubt in the mind of one who has made a thorough study of the subject as to the intent of those who framed the Constitution. The Constitution does not specifically grant to the judiciary the power to declare acts of Congress or of the legislatures unconstitutional. And inasmuch as the American people, through their representatives in the Constitutional Convention, had, not once, but many times, refused to grant the judiciary this power, it is hardly probable that they would have done by implication what they had refused to do directly. The Constitution contains a grant of power to the government which it creates; all other powers of government are reserved to the several states and to the people. Therefore, if the power to declare acts of Congress unconstitutional was not given the judiciary by the Constitution, that power which the Courts exercise must be an usurped power.

Justice Harlan, in his dissenting opinion in the Standard Oil case, after criticising the rest of the Court for reading the word "unreasonable" into the Sherman Anti-Trust Law, said:

> "After many years of public service at the national capitol, and after a somewhat close observation of the conduct of public affairs, I am compelled to say that there is abroad in the land a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction. To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and, in the end, will prove most dangerous to all."

The Opinions rendered in the past few years in the Standard Oil case, the American Tobacco Company case, the Coronada Coal Company case, the Income Tax case, the Child Labor case, and others that might be mentioned, are but striking examples of the contention of a great number of people that the courts are often biased in the rendering of their opinions, by their training and surrounding economic and political influences.

The final report of the Commission on Industrial Relations

(Senate Document, No. 415, p.30, 64th Congress), in its report to Congress in 1915, gave as one of the four main sources of industrial and political unrest, "Denial of justice in the creation, in the adjudication, and the administration of the law." Professor Henry R. Saeger, of Columbia University, testified before the Commission:

> "I don't see how any fair minded person can question but what our judges have shown a decided bias in favor of employers. I would not be inclined to ascribe this so much to a class bias, although I think this is a factor, as to the antecedent training of judges. Under our legal system the principal task of the lawyer is to protect property rights, and the property rights have come to be concentrated more and more into the hands of corporations, so that the successful lawyer of today, in a great majority of cases, is the corporation lawyer. His business is to protect the rights of employers and corporations. It is from the ranks of successful lawyers, for the most part, that our judges are selected, and from that results inevitably a certain angle on the part of a majority of our judges."

Thomas Jefferson, in a letter written to C. H. Hammond, in 1821, in reference to the powers of the judiciary, said:

> "It has long been my opinion that the germs of dissolution of our federal government is in the constitution of our federal judiciary, an irresponsible body (for impeachment is scarcely a scarecrow) working like gravity by day and night, gaining a little to-day and a little tomorrow, and advancing its noiseless step like a thief over the field of jurisdiction."

This is no longer an academic question. Out of it has come the demand for the recall, not only of judges, but of their decisions, as evidenced by Roosevelt's platform upon which he ran for the presidency in 1912. It is idle, in my opinion, to talk about a constitutional amendment which will merely meet the objections that arise in each particular case. We cannot live under a system of government where we are forced to amend the constitution every time we want to pass a progressive law. The remedy must adequately cope with the disease, or there is no use applying it.

I would offer, as a solution of this question, the plan suggested by Senator LaFollette in his speech before the annual convention of the American Federation of Labor at Cincinnati, Ohio, June 14, 1922:

> "I would amend the Constitution so as to provide: 1st, That no inferior Federal Judge shall set aside a law of Congress on the ground that it is unconstitutional. 2nd, That if the Supreme Court

> assumes to decide any law of Congress unconstitutional, or, by interpretation, undertakes to assert a public policy at variance with the statutory declaration of Congress—which alone under our system is authorized to determine the public policies of government—the Congress may by reenacting the law nullify the action of the court."

It seems to me that this is in keeping with the great democratic outburst as expressed in the Declaration of Independence, and the ideals for which the real democrats of this nation have always striven. In fact it voices the sentiment as expressed in the platform of the Democratic Party of 1896, as given by Woodrow Wilson in his History of the People, p. 258:

> "The Democratic platform spoke of the decisions of the Supreme Court against the Income Tax as if it advocated a change in the very character of the Constitution, should power come to the party it represented."

Is it not absurd that nine men, no, five men, none of whom were elected by the people, nor are responsible to the people for their decisions, should exercise such tremendous power? I would not for one moment contend that the courts have always given us bad government as a result of their decisions. No, indeed, they have often given us good government. But the question is, is it democratic? If not, what has become of the immortal phrase:

"Government derives its powers from the consent of the governed."

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Student Comments

THE BUSINESS SIGN STATUTE – A JUDICIAL ENIGMA

I. Introduction

The scope of this comment will be limited to the operation of the Mississippi Business Sign Statute[1] in factual situations involving conditional sales transactions, and will pose one question: does the word 'creditors' in the statute mean only lien creditors, or does it include general creditors as well? The answer to this question is necessary before any real understanding of the sign statute can be had; but, strangely enough, it is this very point which is clothed in doubt and confusion by the Mississippi cases. The question has never been expressly answered by the Mississippi Supreme Court.

Before proceeding to an analysis of the cases it will be necessary to note briefly the history of the statute.

II. History

The Mississippi Sign Statute first appeared as Section 1300 of the Code of 1880, and has been in effect continuously since that time. The language of the Mississippi statute is so like that of the Virginia Traders Act,[2] which was enacted in 1839 and amended in 1849, that it is apparent that our statute was modeled closely after that of Virginia. West Virginia has a similar statute,[3] as does Maryland,[4] but no other states are so blessed. For our purposes, there will be no need to further discuss the West Virginia and Maryland statutes. The West Virginia statute, in both its language and the construction placed on it, is almost identical with that of Virginia, while the procedure which implements the Maryland statute is so different from that of the other states that no discussion of it is warranted here.

Because the language of the Mississippi Sign Statute will be subjected to a careful scrutiny, it will be stated here in part.

> "If a person shall transact business as a trader or otherwise, with the addition of the words "agent," "factor," "and company," or "& Co.," or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without any such addition, all the property, stock, money, and choses in action used or acquired in such business shall, as to the creditors of any such person, be liable for his debts, *and be in all respects treated in favor of his creditors as his property.*" (Emphasis added).

The italicized portions above indicate language which is not contained in the Virginia Traders Act. Another difference between the two

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[1]Miss. Code Ann. § 273 (1942).
[2]Va. Code Ann. § 55-152 (1950).
[3]W. Va. Code Ann. § 4654 (1955).
[4]Md. Code Ann. Art. 2 §§ 18-22 (1951).

statutes is that the Virginia Traders Act requires publication of notice, in addition to the display of a sign.

Until 1924 the trend in Virginia seemed to be in the direction of holding that all creditors were given the protection of the Traders Act. But, in that year, in the leading case of *Capitol Motor Corp. v. Lasker*,[5] the Virginia Supreme Court held that the word 'creditors' in the act meant only *lien* creditors; general creditors could not avail themselves of the protection of the statute. This was obviously an attempt to limit the application of a statute which was considered penal in nature.[6] Four years later, in a United States Supreme Court decision construing the Virginia Traders Act,[7] the holding of the *Lasker* case[8] was followed without comment. All decisions in Virginia subsequent to the *Lasker* case have also followed its lead without question.[9] Thus, we see that Virginia, at an early date, gave an unequivocal answer to a question which may still be open in Mississippi.

With the above history in mind, we must now turn our attention to the construction of the Mississippi statute, and examine judicial statements not nearly so clear as those of Virginia.

III. Purposes

Since our own statute was fashioned from the pattern established by Virginia, it would seem logical to assume that the same considerations which caused the Court of that state to limit the operation of their statute to lien creditors would apply with equal force in Mississippi. An additional fact which would tend to persuade to that view is that the word 'creditors' in Mississippi's general recording statute[10] has been held to mean only lien creditors.[11] However, the answer to the question regarding the Mississippi statute is not nearly so simple as these factors would indicate.

In analyzing the operation of the Mississippi Sign Statute we must first proceed to an examination of the purposes for which the statute was enacted, the evils which it was designed to prevent. Probably the best starting point in such an examination is the case of *Paine v. Hall Safe & Lock Co.*,[12] one of the early cases involving the sign statute. Justice Campbell, speaking for the Court, described in detail the purposes of the statute (then Section 1300 of the Code of 1880):

> "Its design is to promote honesty and secure justice, by precluding the assertion of secret claims of ownership against creditors of him who has been permitted to possess property in his business as a trader and appear to be its owner. Prior to the enactment of this section conditional sales of personal property of any whereby the vendor retained the title, although the vendee had possession,

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5138 Va. 360, 123 S.E. 376 (1924).

6Finance & Guaranty Co. v. Oppenhimer, 276 U.S. 10 (1928); Midland Inv. Corp. v. May, 104 W. Va. 289, 140 S.E. 5 (1927); Capitol Motor Corp. v. Lasker, 138 Va. 360, 123 S.E. 376 (1924).

7Finance & Guaranty Co. v. Oppenhimer, 276 U.S. 10 (1928).

8Capitol Motor Corp. v. Lasker, 138 Va. 360, 123 S.E. 376 (1924).

9Cases cited note 6 supra.

10Miss. Code Ann. § 868 (1942).

11Loughbridge & Bogan v. Bowland, 52 Miss. 546 (1876).

1264 Miss. 175, 1 So. 56 (1886).

> were valid, where this separation of title and possession did not continue for three years, without any writing or record. [Citations omitted]. This is still the law, except as altered by the section under consideration. By it a change was made as to the class of persons contemplated by it, and while the former law as to conditional sales with all their incidents remains as it was as to the great body of the people, it was changed by this section as to all who fall under the designation of trader, and they are to be treated as the absolute owner of what they use or acquire in business, so far as its liability to their creditors is concerned. The evil of permitting a separation of title and possession was found to exist and bear its worst fruits among those called by the general designation of 'trader,' and hence the effort to correct it, as far as possible, by the just requirements of true signs, and in the absence of such indicia of ownership, by that springing from the possession, dominion, and control of the property."

This pronouncement of the purposes of the sign statute has been followed in the long line of subsequent cases construing the statute. The usual declaration of later courts has been that the purpose of the statute is to prevent secret liens which cause creditors to rely on the property in the hands of the trader as being his own.[13]

IV. Judicial Requirement of Recordation

Cases where the property possessed by the trader was held under conditional sales contracts, and the sign statute was applied, are myriad.[14] There is no requirement as to recordation of conditional sales contracts in Mississippi. However, in applying the sign statute to conditional sales transactions, the Mississippi Court has established as a well settled point that a distinction does exist between situations where the conditional sales contract was recorded, and those where it was not. The cases hold that where the conditional sales contract is recorded a creditor of the trader may not successfully claim the property, because the recordation of the contract is notice to all creditors, and there can be no secret lien.[15] The creditor who had notice of the lien of the conditional vendor cannot be said to have relied on the appearance of dominion and control over the property which was exercised by the trader.[16] On the other hand, where the conditional sales contract is not recorded, then just such a situation is created which the

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[13]Gumbel v. Koon, 59 Miss. 264 (1881); Floyd v. C. Nelson Mfg. Co., 93 F.2d 857 (5th Cir. 1938); International Harvester Co. v. Gully, 188 Miss. 115, 194 So. 472 (1940); National Cash Register Co. v. Thompson, 210 Miss. 37, 48 So.2d 608 (1940).

[14]Paine v. Hall Safe & Lock Co., 64 Miss. 175, 1 So. 56 (1886); Gayden v. Tufts, 68 Miss. 691, 10 So. 53 (1891); Tufts v. Stone, 70 Miss. 54, 11 So. 792 (1892); Quin v. Mosler Safe Co., 21 So. 303 (1897); FitzGerald v. American Mfg. Co., 114 Miss. 580, 75 So. 440 (1917); In re Hemming, 51 F.2d 850 (S.D. Miss. 1931); Ellzey v. Frederick, 191 Miss. 633, 3 So.2d 849 (1941).

[15]Dodds v. Pratt, 64 Miss. 123, 8 So. 167 (1886); Gayden v. Tufts, 68 Miss. 691, 10 So. 53 (1891); Tufts v. Stone, 70 Miss. 54, 11 So. 792 (1892); FitzGerald v. American Mfg. Co., 114 Miss. 580, 75 So. 440 (1917); Floyd v. C. Nelson Mfg. Co., 93 F.2d 857 (5th Cir. 1938).

[16]Cases cited note 15 supra.

sign statute was designed to prevent.[17] This is a limitation which has been placed on the operation of the Mississippi Sign Statute by our Court.

Before proceeding it might be well to outline a factual situation which would squarely present the question under consideration. Suppose that A sells goods to B under a title retention or conditional sales contract, and the contract is never recorded. B does not comply with the sign statute. B's creditors, C and D, do not obtain a judgment, attachment, or other lien. B defaults and A retakes the goods. Then C and D throw B into bankruptcy and a trustee in bankruptcy is appointed. The trustee institutes proceedings against A for the goods, basing his claim on the sign statute. The trustee does not have a lien on the goods because they were not a part of the assets of B at the time the petition in bankruptcy was filed.[18] He cannot exercise the lien of any creditor, because at the time of the default and retaking only *general* creditors held claims against the bankrupt.[19] If the trustee is to prevail against A, then, it must be because the sign statute extends its protection to general creditors. This would be the perfect case in which to settle the problem under consideration, but, unfortunately, it has never been presented to the Mississippi Supreme Court.

We will now turn our attention to some of the cases which seem to indicate strongly that this state is committed to the proposition that the word 'creditors' in the statute includes all creditors.

V. Mississippi Cases

In *Gumbel v. Koon*,[20] the creditor invoking the protection of the statute was a lien creditor. However, the decision in nowise turned upon that point. To the contrary, the language used by the Court would seem clearly to indicate that the same result would have been reached regardless of the character of the trader's creditor. The Court, through Justice Cooper, stated:

> "At an early date in the history of this State it was settled by this court that no exception would be engrafted on the statute . . . . It may be that the effect of the statute will be to produce some results not in the contemplation of the legislature at the time it was enacted, but if we depart from the letter of the law as written, we shall be in danger of letting in more evils than we exclude by construction; besides which, the uncertainty that would surround the subject until by a series of decisions the construction of the various clauses of the statute could be fixed would in itself be a most serious evil . . . . As to the creditors of Buffington, whether they were antecedent or subsequent, whether with or without notice of the fact that he was but an agent of another, whether they did or did not extend credit to him in the business, or on the faith of his apparent ownership of the property, the property under this statute

[17]Paine v. Hall Safe & Lock Co., 64 Miss. 175, 1 So. 56 (1886); FitzGerald v. American Mfg. Co., 114 Miss. 580, 75 So. 440 (1917); In re Hemming, 51 F.2d 850 (S.D. Miss. 1931); Crump v. Hill, 105 F.2d 124 (5th Cir. 1939).

[18]Bankruptcy Act § 70 (c), 11 U.S.C. § 110 (1952).

[19]Bankruptcy Act § 70 (e) (1), 11 U.S.C. § 110 (1952).

[20]59 Miss. 264 (1881).

> was his, and subject to their demands . . . . The main object of the statute was to prevent the assertion of secret claims to property, as against creditors of the person who seems to be the owner of it, evidenced by his dealings with it; and it [the statute] conclusively fixes the ownership to be in the person whose sign is exhibited at the place where the business is conducted, or who, in the absence of any sign, is the manager."

In another case, *Floyd v. C. Nelson Mfg. Co.*,[21] a conditional vendor sued the trustee in bankruptcy to recover certain ice cream cabinets and accessories held by the bankrupt under two title retention contracts. The vendor was held entitled to recover the property as against the general creditors of the bankrupt buyer; however, this result rested not on the character of the creditors, but upon the fact that here the title retention contract *was* recorded. Pointing out that where the contract is recorded there is no secret lien, the Court said: "The purposes of the Mississippi Sign Statute, like that of the Virginia Traders Act, . . . is to defeat secret liens . . . . It should not be tortured into a strained construction to defeat honest transactions entered into in accordance with upright business practices." Here, general creditors were attempting to avail themselves of the statute, and the Court, in denying their claim, based the entire decision on the judicial allowance of recordation, which permits the transaction to escape the operation of the statute. No part of the opinion is based on the fact that these were general creditors rather than lien creditors. However, since the goods were in the vendee's hands at the time of the filing of the petition in bankruptcy, it might be argued with some force that, had the contract *not* been recorded, the trustee would have prevailed not because he represented general creditors but because of his statutory lien.[22] Thus, two alternative bases for reaching the same result would have existed had the contract not been recorded.

In the case of *Howe v. Kerr*,[23] J. J. Kerr borrowed $950 from his mother and, with that amount and the joint note of himself and his mother for $800, he bought a saloon business from Rhodes. Montgomery was taken in as a silent partner. Later, without the consent or knowledge of Montgomery, J. J. Kerr, being unable to pay the debts owed his mother and Rhodes, made a joint sale to them of all supplies and fixtures of the business. Montgomery and several other creditors joined in a bill to set aside the conveyance as fraudulent and to have the property applied to the payment of their debts. The case turned on the construction to be given the sign statute. Justice Cooper, in the opinion of the Court, said:

> "There is no doubt that Kerr was indebted to his mother and Rhodes in sums equal to the full value of the property sold to them. The real contention of appellant is that it was not competent for them [Rhodes and the mother] to accept the partnership assets in payment of their demands against J. J. Kerr individually. But the statute declares that, as to creditors, the property is to be

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21 93 F.2d 857 (5th Cir. 1938).
22 Bankruptcy Act § 70(e)(1), 11 U.S.C. § 110 (1952).
23 69 Miss. 311, 13 So. 730 (1891).

> treated as the property of Kerr. They might have subjected it to their demands by proceeding at law to judgment and execution, and what the law would have done it was permissible for the parties to do."

It appears from the opinion that the Court permitted *general* creditors to take advantage of the provisions of the sign statute to defeat the action brought by a silent partner and other creditors to have the conveyance of partnership property declared void and the property subjected to the payment of partnership debts. While the opinion states that Montgomery was a silent partner, and that no sign was displayed showing his interest in the business, it is not stated whether the mother and Rhodes (transferees) actually knew of his interest. If they did not, as we must assume from the facts stated in the case, there is again an alternative basis upon which the result reached could rest. The Mississippi Court has held that each member of a partnership is an agent for all other members,[24] but that a partner is not bound by the acts of his copartner unless the act is within the scope of the partnership business, or was authorized or recognized by the partner.[25] It could be argued that, in the *Howe* case, J. J. Kerr was the agent of Montgomery, and, while the sale was outside the scope of the partnership business, still Montgomery had placed apparent authority in J. J. Kerr, and would be estopped from denying actual authority against a bona fide purchaser for value without notice. Of course, if the mother and Rhodes had known of the partnership of Montgomery they would not have been bona fide purchasers without notice, and the case would stand squarely for the proposition that *all* creditors are protected under the Mississippi Business Sign Statute.

Columbus Buggy Co. v. Turley & Parker,[26] involved an analogous factual situation. The opinion stated as follows:

> "It thus appearing that appellees were creditors of Smitha, under the authority of *Howe v. Kerr,* 69 Miss. 311, they are clearly entitled to be protected by the sale to them by their debtor to the extent of $1700. Section 4234, code of 1892 (§ 1300, code of 1880), protects the rights acquired by appellee under the sale to them from their debtor."

It would thus seem that, in both the *Howe* case[27] and the *Columbus Buggy Co.* case,[28] the Court strongly implied that the protection given creditors by virtue of the sign statute is not limited to those creditors holding a lien, but is extended to general creditors as well. Here the contract provided that the vendee should have possession of the goods, and have the power to resell them. But this power of resale was based on an express provision of the contract making Smitha the agent of the vendor. It is stated that Smitha's creditors (who had no lien) did not

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[24]Davis v. Richardson, 45 Miss. 499 (1871); Persons v. Oldfield, 101 Miss. 110, 57 So. 417 (1912).

[25]Goodman v. White, 25 Miss. 163 (1852).

[26]73 Miss. 529, 19 So. 232 (1895).

[27]See note 23 supra.

[28]See note 26 supra.

know of the existence of the title retention contract. The contract was not recorded and Smitha did not comply with the sign statute. So, again, the same result could have been reached on principles of agency law, avoiding any application of the statute. But, the Court, in citing *Howe v. Kerr* with approval, expressly based the decision on the sign statute. While the Court does not discuss the character of the creditors here, there were none but general creditors. So, if the decision is based on the sign statute, as the Court clearly says it is, then we are forced to the conclusion that the protection of the sign statute was, in this case, extended to general creditors.

In *Gillaspy v. International Harvester Co.*,[29] the Mississippi Supreme Court seems to have reaffirmed the position taken in the *Howe* and the *Columbus Buggy Co.* cases. In this case the Hardware company was engaged in the mercantile business and the appellee sent a power engine to the Hardware company for demonstration purposes. During one of these demonstrations the engine broke down and was left in the street. A few days after the arrival of the engine the Hardware company was declared bankrupt and the trustee in bankruptcy instituted a replevin action for the engine, claiming that it was part of the assets of the bankrupt estate. Permitting the trustee to prevail over the claim of the appellee, Harvester company, Justice Cook stated:

> ". . . As between the parties to this contract, it may be admitted that the harvester company remained the owner of the machine, but it seems clear that by our statute the engine could have been levied upon and sold by the *general* creditors of the hardware company. (Emphasis added). When a trader acquires or uses property in his business, the property so acquired or used, as to creditors, will be treated as the property of the trader, no matter what may be the undisclosed contract of the trader and the party from whom the property is acquired . . . . Persons dealing with traders are not burdened with the necessity of inquiring about the ownership of property offered for sale or used in the trader's business. The law fixes the ownership so far as the legal rights of creditors may be affected thereby."

The above decision permitted a trustee in bankruptcy to avail himself of the benefit of the Mississippi Sign Statute to recover assets of the bankrupt estate on the theory that the general creditors of the bankrupt could have invoked the statute and could have subjected the property held by the bankrupt to the satisfaction of their debts. Again, however, a second ground may exist upon which the result of the case may be justified. It could be argued here that the trustee was allowed to recover under the sign statute, not because he represented general creditors, but because of his statutory lien.[30] If this were so, it seems inconceivable that the Court did not expressly state its reasoning.

In *P. E. Payne Hardware Co. v. International Harvester Co.*,[31] the hardware company handled, as local agents of the harvester company, gasoline engines and agricultural implements. The manager of the

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29109 Miss. 136, 67 So. 904 (1915).
30Bankruptcy Act § 70 (e) (1), 11 U.S.C. § 110 (1952).
31110 Miss. 783, 70 So. 892 (1916).

hardware company abandoned the business and the harvester company sued out a writ of replevin and levied upon and seized the gasoline engines and implements in the possession of the hardware company. Some time later, after the seizure of the machinery by the harvester company, a receiver of the insolvent hardware company was appointed upon petition of the *general* creditors. The receiver intervened in the replevin suit, claiming the property levied upon and seized as part of the assets of the insolvent hardware company. Holding for the receiver as against the harvester company, Justice Cook summarized the position of the receiver in the following terms:

> ". . . The receiver claims property because he says it was acquired in the business of the corporation, formed a part of its stock in trade, and in the absence of a sign showing that the goods in question were not the property of the Hardware Company it will be treated as the property of the Hardware Company in favor of its creditors; that he, as receiver, appointed by the chancery court, not only represents the corporation, but its creditors as well, and that by his appointment as receiver he was vested with powers to take into his possession all the assets of the corporation, and was expressly authorized by the court to intervene in this suit, for the purpose of contesting with the plaintiff in replevin the ownership of the property. If, as to creditors, this property belonged to the mercantile corporation doing business in Tylertown, by virtue of our statute (section 4784, Code 1906) [Miss. Code Ann. § 273 (1942)], he, the receiver, is entitled to the possession of same. This position of the receiver seems to be sound in law, as well as in fact.
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> ". . . Among the numerous decisions of this court construing section 4784 of the Code of 1906, we have not been able to find any case precisely in point; but we are convinced that this case comes within the control of said section of our Code, and that the property in question, in so far as the creditors of the Hardware Company are concerned, will be conclusively held to be the property of the Hardware Company . . . ."

The *Payne* decision clearly indicates that the right of the receiver to repossess the property for the benefit of the insolvent estate was predicated upon such right existing in behalf of the general creditors. However, here too there is another side to the coin. Mississippi follows the general rule that, in the absence of statute, general creditors cannot usually secure the appointment of a receiver.[32] The appointment of a receiver has been said to amount to a legal process, or an equitable execution, and fixes the rights of the general creditors upon the property subject to the receivership.[33] The fact that the receiver has some sort of lien is shown by the fact that the rights of a conditional vendor, whose contract was not recorded, were held inferior to the claims of a receiver appointed at the instance of general creditors, although the vendor's rights would have been superior to those of the individual

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[32]Clark v. Fleming, 130 Miss. 504, 94 So. 458 (1922); 45 Am. Jur., Receivers, § 10.
[33]75 C.J.S., Receivers, § 134.

creditors.[34] So, it could be argued that the decision in the *Payne* case was based on the fact that the receiver had a lien of some kind, thus invoking the sign statute. But, in view of the Court's silence on this point — and the fact that the language indicates that the receiver had the same rights here as the general creditors — this writer does not consider that argument a persuasive one.

VI. Conclusion

We have seen in each of the Mississippi cases discussed above that there were two bases which would support the decision reached. In every case one of these bases was that the word 'creditors' in the sign statute means all creditors, both lien and general. In every case the decision, from the language used by the Court, was based firmly on the sign statute. At first glance it may appear that these cases prove nothing, because none of them are square holdings. It is submitted, however, that this reasoning cuts two ways. The existence, in every case, of an alternative device, whereby the Court could have reached the same result without committing itself on the construction to be given the sign statute, lends even more weight to the argument that the word 'creditors' in the statute means all creditors. From the cases, we are forced to the conclusion that the Mississippi Supreme Court considers that the protection of the statute extends to general creditors.

Fred C. DeLong, Jr.

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[34]Hetherington & Sons v. Rudisill, 28 F.2d 713 (4th Cir. 1928).

THE FORFEITURE CLAUSE OF CONDITIONAL SALE CONTRACTS – A CAUSE FOR EQUITABLE INTERVENTION IN MISSISSIPPI?

I. Introduction

The tremendous increase in credit purchasing that has characterized the period since the termination of World War II has placed the conditional sale contract in a place of prominence among the various forms of credit transactions. A large number of the conditional sale contracts now employed by the conditional seller contain what have been termed forfeiture clauses.[1] The effect of this clause is that, "if the buyer defaults in his payments, and the seller exercises his right to retake, all part payments previously made shall be treated as forfeited, or as rental payments, or as payments for damage and depreciation, or as liquidated damages."[2]

The problem presented by the presence of any forfeiture clause in a contract is created by the conflict between the inviolable rights of the parties to contract as they may choose and the proposition that equity abhors a forfeiture and will grant relief against the same. This conflict is brought into its sharpest focus by the forfeiture clauses found in many conditional sale contracts. Under such contracts, the conditional vendor has an option of remedies that he may pursue upon default by the vendee: he may repossess the property to protect or enforce his security interest, or he may rescind the contract and retain the part payments made thereunder as compensation for the possession and use of the property which was the object of the contract. The results that arise by the selection of the latter alternative by the vendor furnish the subject matter for this paper.

If the amount forfeited under the terms of the contract bears a reasonable relation to the actual rental value of the property for the period of time that it was in the vendee's possession, admittedly no grounds for equitable relief are present as no one would deny the right of the vendor to be reasonably compensated for the use of the property. However, if there is a great disparity between the amount paid under the contract by the vendee and the actual rental value of the property, the question then arises whether or not a court of equity should interpose relief in order to prevent a forfeiture.

It appears that this question has never been squarely decided by the Supreme Court of Mississippi; but some of the dicta used by the Mississippi Court, examined in light of the nature of the conditional sale contract and the title retained thereunder in Mississippi, may give some insight into the possible solution of this problem.

Illustrations of the methods in which other jurisdictions have attacked and solved this seemingly irreconcilable conflict will perhaps afford some enlightenment in reaching a conclusion as to what the Mississippi view should be.

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[1]Bogert, 2A Commentaries on Conditional Sales § 131 (1924).
[2]Ibid.

II. STATUS OF THE LAW IN OTHER JURISDICTIONS

A. Relief Against A Forfeiture Denied

A majority of jurisdictions in which this question has been decided have refused to look beyond the provisions of the contract to find a forfeiture and have enforced "such stipulations as the parties were content to make."[3] The Supreme Court of North Dakota, strictly applying the terms of a forfeiture clause, stated:[4]

> "To hold that by reason of his own default the vendee can recover all his payments would work a revolution of business methods long established, and in the end result in untold hardships to vendors. Notwithstanding the fact that in some instances the vendee may be exposed to hardship by denial of his rights to recover all the payments made, we see no sound reason based on logic or authority warranting us in holding that he may do so."

The Supreme Court of California has even refused to grant relief against a forfeiture claimed under a conditional sale contract notwithstanding a statute authorizing such relief in the absence of "a grossly negligent, willful, or fraudulent breach of duty."[5] The Court justified their position by finding that during the time the vendee had possession of the property he had earned a "considerable amount for work done by him" and that he collected rent from persons to whom he had rented the property, consequently, his default was "willful and grossly negligent."[6]

Numerous instances can be found in which courts, upon default of the vendee, have sanctioned forfeitures of the part payments made under the contract although there was a complete absence of a forfeiture clause in the contract.[7] Where the contract is silent regarding forfeiture provisions, the vendors have been permitted to repossess the property upon default of the purchaser and retain the part payments made thereunder, the courts in such cases finding forfeiture clauses by implication:[8]

> ". . . where the vendee is in default, the payments may be retained without the aid of a forfeiture clause; that an agreement forfeiting payments made by the one party in fault is to be implied."

Williston is of the opinion that little importance should be attached to the presence of a forfeiture clause in the contract for "when not ex-

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[3]Jones, 3 Chattel Mortgages and Conditional Sales § 1382 (6th ed. 1933).

[4]Pfeiffer v. Norman, 22 N.D. 168, 133 N.W. 97, 100 (1911).

[5]Calif. Civ. Code § 3275 (1872). "Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

[6]Bird v. Kenworthy, 277 P.2d 1 (Cal. App. 1954).

[7]Silverthorne v. Simon, 59 Cal. App. 494, 211 Pac. 26 (1922), forfeiture permitted because time was of the essence. ". . . its (time of the essence clause) effect is to entail a forfeiture by sheer force of the contract itself, upon the mere default of the purchaser by his failure to make payments . . ." Mohler v. Guest Piano Co., 186 Iowa 161, 172 N.W. 302 (1919); Peterson v. Chess, 92 Wash. 682, 159 Pac. 894 (1916); Peabody v. New York, N. H. & H. R. Co., 187 Mass. 489, 73 N.E. 649 (1905).

[8]Mohler v. Guest Piano Co., 186 Iowa 161, 172 N.W. 302, 306 (1919).

pressed it is generally a fair implication" that the defaulting vendee was to forfeit payments.[9]

In *Rayfield v. Van Meter*[10] it was contended by the vendee that in equity he should be permitted to recover the sum paid under the contract, less proper compensation for the use of the property, upon repossession by the vendor after default by the purchaser. The California Court, rejecting this defense, stated:[11]

> "It seems to us that there is little equity, and certainly no sound policy, in allowing the buyer, under such circumstances, to be at pleasure to quit his contract, with no other liability than such as the law would have implied had there been no express contract at all. No case is made for the interposition of equity."

When the doctrine of restoration to the statu quo ante, upon the rescission of the contract, has been urged in some jurisdictions in an effort to escape the results of the forfeiture clause, the courts have not hesitated to declare this doctrine to be inapplicable under such circumstances.[12] It is the view in those jurisdictions following this principle that the repossession by the vendor is not a rescission of the contract, but an acting under the contract, and that therefore "the rule requiring one who rescinds a contract to put the other in statu quo should not apply."[13] A noted textwriter acquiescing in the theory advanced by this line of decisions has stated that "the right given expressly or impliedly to retake possession can certainly not be considered as meaning a right to rescind the transaction by putting the buyer in statu quo . . . ."[14]

However, it is submitted that decisions from those jurisdictions referred to above must be interpreted in light of the alternatives open to the vendor in Mississippi under a contract of conditional sale containing a forfeiture clause — he may either retake possession of the property and subject it to the enforcement or protection of his security interest, or he may *absolutely rescind* the contract; and the distinction between and the results flowing from these alternatives. It is important to note the distinction between a rescission of a conditional sale contract and the repossession of the property to protect or enforce the seller's security interest. Where there is a rescission, the vendor's interest in the repossessed property is that of an absolute owner, and it is a propostion of law that the parties must be restored to the statu quo ante.[15] On the other hand, the vendor's interest in the property, where there has

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[9] 3 Williston, Sales § 579c (rev. ed. 1948).

[10] 120 Cal. 416, 52 Pac. 666 (1898).

[11] 52 Pac. at 667.

[12] Haynes v. Hart, 42 Barb. (N. Y.) 58 (1864); Quinby v. Lowell, 89 Me. 547, 36 Atl. 902 (1897); Schmoller & Mueller Piano Co. v. Smith, 204 Iowa 661, 215 N.W. 628 (1927).

[13] C. W. Raymond Co. v Kahn, 124 Minn. 426, 145 N.W. 164, 166 (1914). "We do not decide that all partial payments made by the buyer are forfeited when the seller recovers the property. We do decide that, if not forfeited, the seller should be credited with whatever is determined to be the value of the buyer's use of the property, and the amount of its depreciation."

[14] Note 9 supra.

[15] Kyser v. Southern Bldg. & Loan Association, 224 Ala. 673, 141 So. 648 (1932); Pryor v. Oak Ridge Development Corp., 97 Fla. 1085, 119 So. 326 (1928); Caddo Oil & Mining Co. v. Producer's Oil Co., 134 La. 701, 64 So. 684 (1914).

been merely a retaking under the contract, is for security purposes only and such property may be either sold by the vendor with the proceeds applied to the debt, or may be held by him until the delinquent payment has been made by the vendee. In the latter instance the attributes of absolute ownership are absent in the vendor and any conduct by the vendor inconsistent with the security title he retains will render the repossession by him a rescission. Another significant distinction is that in the case of a rescission there can be a forfeiture while in the other situation there cannot.

There can no longer be any doubt that in Mississippi the mere retaking of the property for the purpose of protecting or enforcing the security interest of the vendor is not tantamount to a rescission of the contract.[16] However, this fact does not preclude the effectuation of a rescission when the vendor chooses to exercise the option under the contract giving him the right to rescind upon the default of the vendee. It is somewhat incongruous to maintain that a rescission has not occurred when the vendor, acting under the express terms of the agreement, has rescinded the contract.

The position most courts have assumed in refusing to alleviate against forfeitures, and instead strictly enforcing the contractual provisions, was very succinctly summarized by Justice Holmes in *W. W. Bierce, Ltd. v. Hutchins*,[17] when he spoke of the contract of conditional sale in the folowing manner:[18]

> "Such sales sometimes are regulated by statute and put more or less on the footing of mortgages. With the development of its effect there has been some reaction against the Benthamite doctrine of absolute freedom of contract. But courts are not legislatures and are not at liberty to invent and apply specified regulations according to their notions of convenience. In the absence of a statute their only duty is to discover the meaning of the contract and to enforce it, without a leaning in either direction, when, as in the present case, the parties stood on an equal footing and were free to do what they chose."

B. Relief Against Forfeitures Granted

The problem presented by the presence of forfeiture clauses in conditional sale contracts has been solved by statutory enactments in some jurisdictions.[19] However, where relief against forfeitures, either

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[16]Bankston v. Hill, 134 Miss. 288, 98 So. 689 (1924).

[17]205 U.S. 340 (1907).

[18]Id. at 347-48.

[19]Mo. Rev. Stat. § 428.110 (1949) provides: "whenever such property is so sold or leased, rented, hired or delivered, it shall be unlawful for the vendor, lessor, renter, hirer or deliverer, or his or their agent or servant, to take possession of said property without tendering or refunding to the purchaser, lessee, renter or hirer thereof, or any party receiving the same, the sum or sums of money so paid, after deducting therefrom a reasonable compensation for the use of such property, which shall in no case exceed twenty-five per cent of the amount so paid, *anything in the contract to the contrary notwithstanding*, and whether such condition be expressed in such contract or not, unless such property has been broken or actually damaged, and then a reasonable compensation for such breakage or damage shall be allowed." As construed by the Missouri Court in Dailey v. Singer Mfg. Co., 88 Mo. 301 (1885), this section is not "applicable to the case of an absolute sale, but applies to sales

express or implied, has not been provided for by the legislatures some courts have filled this vacuum, and in numerous instances have granted relief by adopting one of several possible doctrines — "no forfeiture was authorized expressly in the contract, because there has been a rescission of the contract, that equity abhors a forfeiture, or simply that recognition of such an unconscionable advantage in the vendor is contrary to the fundamental principles observed in courts of equity."[20]

The Supreme Court of Florida, in *Malone v. Meres*,[21] recognized that a vendor under a conditional sale contract had an option to retake possession of the property and forfeit all payments made thereunder, or that he might elect to consider the property as security for the payment of the purchase price. The Court in delimiting the rights of the vendor under such an option stated:[22]

> "That feature of contracts for the sale of personal property continuing the title in the vendor until the payment in full of the purchase price, called conditional sale, is an attempt to reserve a vendor's lien, which existed at common law and was continued so long as the vendor retained possession of the property and which was lost upon the delivery of possession of the buyer.
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> "Such an agreement of sale, when signed by both vendor and purchaser, results in securing to the vendor the option of rescinding the sale and retaking possession of the property, *subject to the power of equity to prevent an unconscionable forfeiture*, or waiving the right of possession and forfeiture treating the instrument as one to secure the payment of money.
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> "This doctrine is in harmony with the maxim that equity abhors a forfeiture, and is consistent with the power of a court of equity under some circumstances to declare such a contract a mere security and protect the purchaser from unconscionable forfeiture." (Emphasis added).

The theory that a forfeiture clause is implied in conditional sale contracts and that partial payments may be retained by the vendor where the vendee is in default was expressly rejected by the Indiana Court in *Quality Clothes Shop v. Keeney*.[23] In refusing to permit the vendor to keep the part payments made under the contract because no forfeiture was expressly authorized by the instrument the Court stated:[24]

> ". . . but there was no provision that in case of default on appellee's part in the performance of any of the conditions to be performed that prior payments should be forfeited. In the absence of such a stipulation, payments previously made, less all damages sustained by a vendor, may be recovered by the vendee when the vendor has retaken the property upon the vendee's default."

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made on the condition that the title is to remain in the seller until the purchase price is fully paid." The provisions of the Ohio Rev. Code Ann. § 1319.14 (Page's 1953), are of similar effect. See also the Uniform Conditional Sales Act § 25.

20Jones, op. cit. supra note 3.

21191 Fla. 709, 109 So. 677 (1926).

22109 So. at 694.

2357 Ind. App. 500, 106 N.E. 541 (1914).

24106 N.E. at 543, 544.

This view has also been expressed by the Idaho Court.[25]

The attitude prevailing in Georgia regarding forfeiture provisions under contracts of conditional sale has been pronounced as follows:[26]

> ". . . and provisions for forfeitures are regarded with disfavor, and construed with strictness when applied to contracts, and the forfeiture relates to a matter admitting of compensation or restoration. Where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture upon such compensation being made . . . . 'On a sale reserving title till the price is paid, many of the cases hold that partial payments are forfeited on default of the residue; but in courts possessing equity powers the modern tendency is to allow the seller who rescinds a contract for default after receiving a part of the price to retain only so much as will compensate him.'"

The judiciary of North Carolina in referring to forfeitures under a conditional sale contract stated in *Puffer & Sons Mfg. Co. v. Lucas*:[27]

> "To permit the so-called 'lessor' to resume possession of the property, and declare all payments forfeited, when perhaps all but one may have been paid, is contrary to the fundamental principles observed in courts of equity."

A similar pronouncement was made by the Maryland Court in *Lincoln v. Quynn*.[28]

In *J. D. Pittman Tractor Co. v. Bolton*,[29] the conditional vendee had filed a bill in equity praying for relief against a forfeiture for nonpayment of an installment when due. The contract contained the typical forfeiture provisions which provided that the seller "may take possession of said property wherever and whenever found, and, with or without notice or demand, may elect to treat buyer in default, and in such event all of the rights, titles, and equities of the buyer in said property shall immediately cease and determine, and seller shall be released from all obligations to transfer or deliver said property to the buyer, and all sums of money theretofore paid, and all sums then due and unpaid by the buyer to the seller hereunder or under said promissory notes shall remain the property of seller and shall be considered compensation for the use, wear and tear and depreciation of said property, and buyer agrees forthwith to pay to seller all of said payments which are then due and unpaid." The parties had also stipulated that time would be considered of the essence of the contract.

The lower court granted the relief sought by the vendee and the Supreme Court of Alabama, affirming this decision, stated:[30]

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[25]Berlin Machine Works v. Dehlbom Lumber Co., 32 Idaho 566, 186 Pac. 513 (1919).

[26]Hays v. Jordan, 85 Ga. 741, 11 S.E. 833, 835 (1890).

[27]112 N.C. 377, 17 S.E. 174 (1893).

[28]68 Md. 299, 11 Atl. 848 (1888). "It was stipulated in the contract of sale that, if Hoover made default in any of the credit payments, Lincoln might reclaim and take possession of the goods, and that all payments which had been made up to that time should be forfeited. A court of equity will not lend its aid to enforce a forfeiture of this kind."

[29]238 Ala. 300, 191 So. 360 (1939).

[30]191 So. at 362.

> "Stipulations making time of the essence of the contract, empowering the seller to retake possession for condition broken, all payments theretofore made being treated as rentals for the use of the property, while valid at law, are treated in equity as in the nature of a forfeiture, and not to be so enforced as to work oppression and injustice.
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> "But equitable relief does not depend upon waiver of the conditions written into the contract, for example, if the buyer should meet every installment on time until the greater part of the debt is paid, and then from inability or neglect fails to pay an installment on time, the seller, taking advantage of the letter of his contract, proceeds to repossess the property as his own, refusing the buyer an opportunity to pay the balance. The seller is using the forfeiture provisions of the contract oppressively. Equity, working out its own remedies, interposes to prevent injustice, provided always the buyer is ready and willing to pay the debt. The primary purpose of the contract is to secure the debt."

It would thus appear from the above quote that relief of the buyer from the harshness of a forfeiture clause in Alabama is predicated upon the ability and willingness of the buyer to pay the delinquent installments. What the results would be if the vendee commenced an action to recover the partial payments in excess of the reasonable rental value of the property, not asking for the return of the property that was repossessed, is left in doubt by this decision.

The general attitude of the courts in those jurisdictions which have recognized that a vendee should be permitted to invoke equitable relief when faced with a forfeiture for which he has contracted and the various theories advanced in justifying such intervention can best be summarized by quoting a text on the subject of contracts of conditional sales.[31]

> "None can gainsay that it is a harsh doctrine that permits a conditional vendor to retake and appropriate the goods after the vendee has paid all but a mite, and to retain the payments already made in addition to the goods themselves, leaving the vendee stripped of all rights and interest whatsoever. Recognizing the unfairness in such a situation, the courts, sometimes with no other authority than the perception of an equitable insight for individual justice commonly allowed to the department of equity, extend aid to the vendee in the form of a recovery of payments made or of a right to redeem. The reasons given for this judicial extrication of the vendee from his dilemma are sometimes hazy and unsatisfactory. Legal rules are strained or ignored, the natural logic of the transaction is stretched, and often the point is carried with nothing for its basis but dogmatic assertion; but sans rule, sans logic, sans everything — the idea has gained considerable currency that the overreached conditional vendee must in some way be protected."

Now that there has been an exposition of the conflict regarding the matter of relief from forfeitures, the writer will attempt to specu-

[31] Jones, op. cit. supra note 3.

late as to which line of decisions the Mississippi Court would follow, and to offer some rationale for the choice the Court may make.

III. Grounds For Extending Relief In Mississippi

A. Nature of Conditional Sale Contract

Since the conclusion that is ultimately reached in this paper is vitally affected by the Court's outlook concerning the character of the conditional sale contract in Mississippi, any discussion of the probable fate of a forfeiture clause, when and if such question is presented to the Mississippi Court, must necessarily be preceded by an examination of the nature of the conditional sale transaction and the title retained thereunder by the vendor as these have been construed by the Mississippi Court.

It should be noted that in many states a conditional sale contract operates to reserve the absolute title to the property in the vendor until the condition (usually the payment of the purchase money) is fulfilled.[32] This construction is illustrated by the California Court which has held that the title retained by the vendor is not a lien but is rather the reservation of the absolute title, subject to be defeated by the payment of the full purchase price by the vendee.[33] On the other hand, there are a number of jurisdictions which regard the retention of title by the vendor as essentially a security transaction to secure the payment of the purchase price.[34]

However, none of these jurisdictions which have adopted the "security interest" theory seem to go as far in applying, nor are as consistent in upholding, the conditional sale as a security transaction, as the Mississippi Court. The cases are legion in which the Supreme Court of Mississippi has stated that a conditional sale contract reserving title in the vendor until full performance by the vendee is merely a security arrangement, a reserved security title.[35] The character that is ascribed the conditional sale contract is best illustrated by the graphic language of Chief Justice McGehee when he stated:[36]

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[32]Shapiro v. Hoffman's Dairy Co., 105 F. Supp. 867 (E.D. Mich. 1952); Joseph Turk Mfg. Co. v. Singer Steel Co., 111 F. Supp. 485 (N.D. Ohio 1951); Beal v. Universal C. I. T. Credit Corp., 146 Me. 437, 82 A.2d 412 (1951).

[33]Phelps v. Loupias, 97 Cal. App. 350, 217 P.2d 748 (1950).

[34]Gateway Discount Corp. v. Reed, 266 S.W.2d 320 (Ky. 1954); Home Indem. Co. v. Bowers, 194 Tenn. 560, 253 S.W.2d 750 (1952); Tatelbaum v. National Store Fixtures Sales Co., 196 Md. 599, 78 A.2d 228 (1951); J. D. Pittman Tractor Co. v. Bolton, 238 Ala. 300, 191 So. 360 (1939); Minneapolis Securities Corp. v. Silvera, 254 Wis. 129, 35 N.W.2d 322 (1948); Petersime Incubator Co. v. Bunn, 239 S.W.2d 416 (Tex. Civ. App. 1951).

[35]Murdock Acceptance Corp. v. Smith, 222 Miss. 594, 76 So.2d 688 (1955); Dearborn Motor Credit Corp. v. Hinton, 221 Miss. 643, 74 So.2d 739 (1954); Associate Discount Corp. v. D. B. Ruddock, 224 Miss. 533, 81 So.2d 249 (1955); Snipes v. Commercial & Industrial Bank, 225 Miss. 345, 83 So.2d 179 (1955); Ford v. Commercial Securities Co., 223 Miss. 736, 79 So.2d 253 (1955); Fanning v. C. I. T. Corp., 187 Miss. 45, 192 So. 41 (1939); Roberts v. International Harvester Co., 181 Miss. 440, 179 So. 745 (1938); Commercial Credit Co. v. Spence, 185 Miss. 293, 184 So. 439 (1938); Federal Credit Co. v. Bolewore, 163 Miss. 830, 142 So. 1 (1932); Bankston v. Hill, 134 Miss. 288, 98 So. 689 (1924); Ross-Meehan Brake Shoe Foundry Co. v. Pascagoula Ice Co., 72 Miss. 608, 18 So. 364 (1895); Tufts v. Stone, 70 Miss. 54, 11 So. 792 (1892); Dederick v. Wolfe, 68 Miss. 500, 9 So. 350 (1891).

[36]Murdock Acceptance Corp. v. Smith, 222 Miss. 594, 605, 76 So.2d 688, 692 (1955).

> "The action of replevin was based on the usual conditional sales contract which this court has repeatedly held to *constitute security for the payment of the indebtedness, even though the contract purports to retain title to the property in question . . .*" (Emphasis added).

Along with this concept that the contract of conditional sale is merely a security arrangement, the Court has also held on numerous occasions that when the vendor repossesses upon the default of the purchaser he must deal with the property as security, treating it with full regard for the equitable rights of the purchaser.[37] The concern which the Mississippi Court has displayed for the equitable rights of the vendee, and the zealousness with which these rights have been protected from abridgment by the vendor, can be well ascertained from the lucid opinion of Judge Griffith in *Brewer v. Universal Credit Co.*[38]

> "When this court has said, as it has so often said, that a conditional sales contract vendor shall deal with the property as security only and with due regard to the equitable rights of the purchaser, it has meant, and we repeat, that the vendor and his assignee shall, in respect to those rights, deal justly with the purchaser . . . ."

From the foregoing discussion it can be discerned that in Mississippi the contract of conditional sale and the duties of the vendor thereunder have acquired certain distinct characteristics — the contract is merely a security transaction, similar in most respects to a chattel mortgage, and the vendor, upon retaking the property, must act with due regard for the equities of the vendee. These characteristics lay the predicate for the theory that a court of equity in Mississippi would intervene to prevent a forfeiture by the vendee of partial payments made under the contract which are greatly out of proportion to the reasonable rental value of the property upon the rescission of the contract by the vendor. The basis for such an assumption is that if the Court has dedicated itself to the protection of the vendee's equities when there has been a repossession by the vendor merely to protect or enforce his security interest, then, a fortiori, such equities should be protected when the vendor has rescinded the contract and is claiming both the property and the partial payments under the guise of rent. There seems to be no logical reason why the equitable rights of the defaulting vendee in the property should be the object of the Court's protective shield in the one instance and not in the other. Nor does the fact that the vendee contracted for such forfeiture furnish any reasons; for if a court of equity were never permitted to look beyond the provisions of the contract but were instead strictly and unequivocally bound by the written instrument, interpreted in a vacuum with absolute disregard for any extenuating circumstances, then it is rather difficult to conceive of any situation in which equity could intervene to prevent a forfeiture.

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[37]Brewer v. Universal Credit Co., 191 Miss. 183, 192 So. 902 (1940); Roberts v. International Harvester Co., 181 Miss. 440, 179 So. 745 (1938); Dearborn Motors Credit Corp v. Hinton, 221 Miss. 643, 74 So.2d 739 (1954).

[38]191 Miss. 183, 192 So. 902 (1940).

"Equity, working out its own remedies, interposes to prevent injustice . . . ."[39]

B. Case Authority

As has been previously pointed out, there seems to be no case in this jurisdiction in which the question of relief against forfeitures under conditional sale contracts has been directly presented to the Mississippi Supreme Court. However, the Mississippi Reports are not completely silent in regard to this matter. In several instances the Court has alluded to the problem and by way of dicta has revealed the position it may assume when confronted with inequities precipitated by the forfeiture provision.

The first indication by the Mississippi Court that a defaulting vendee may find relief in a court of equity against the forfeiture demanded by the vendor can be found in the case of *Duke v. Shackleford.*[40] In this case Shackleford sold to Mary Dellahite some machinery for which he received $550 cash and Mary's note for $225. Title to the property was reserved by Shackleford until payment of the note. The note was not paid at maturity, and Shackleford brought an action of replevin against Duke who had purchased the property from Mary. The Court, in permitting the vendor to replevy the property without first returning the payment already made, pointed out that this was an action at law and stated regarding the vendee's equitable remedies:

> "What rights, if any, the vendee in such a contract might have in a court of chancery is not before us."

Citing the *Duke* case as authority, Bogert has commented:[41]

> "In some decisions it is suggested that, although the buyer has no legal right to the return of his part payments, he may have rights in equity."

In *Tufts v. Stone,*[42] the parties had entered into a conditional sale contract whereby the conditional vendee would have possession of a soda fountain, while title was retained by the conditional vendor to secure the purchase price. The consideration of the contract was $800, evidenced by thirty-two promissory notes for $25 each, payable monthly. Later, the conditional vendee moved to another county and took the soda fountain with him. He commenced business in this county, using the fountain in his business, under the name of "Martz Bros." The conditional sale contract had been recorded in both counties where the vendee had transacted business. "Martz Bros." made a general assignment for the benefit of creditors, and the soda fountain was turned over to the assignee, Stone. The conditional vendor instituted a replevin action. The Court held that the Business Sign Statute did not apply because the contract had been recorded, and, by the way of

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[39]See note 30 supra.
[40]56 Miss. 552 (1879).
[41]Bogert, 2A Commentaries on Conditional Sales § 130 (1924).
[42]70 Miss. 54, 11 So. 792 (1892).

dictum, stated what the rights of the conditional vendee would be in a court of equity:[43]

> "Martz (the conditional vendee) had such title and interest in the property when this litigation arose as would have been protected in a court of equity. He had paid Tufts (the conditional vendor) about $500 in pursuance of his agreement, and would the latter be permitted, in equity, to retain this $500 and retake absolutely, as his own, the property for which the $500 had been paid? Rather, would not Tufts have been allowed to resort to his security only so far as the same might be necessary to satisfy the balance due from Martz? Suppose Martz had paid thirty-one of the thirty-two notes, and by disaster had been unable to pay the remaining note of $25, *would any court of conscience tolerate an assertion of Tuft's right to hold on to the* $775 *already paid him, and to take as his own the property also?*" (Emphasis added).

Although the report of the *Tufts* case does not indicate the presence of an express forfeiture clause in the contract, it is suggested that the language employed by the Court is a cogent indication of the course the Court would take if the problem treated in this comment were presented.

The case of *Dederick v. Wolfe*[44] involved a contract under which the seller delivered to the defendants certain machinery retaining title in himself, for which he received notes payable one, two, and three years later. There was a stipulation to the effect that the seller might, on default of the buyer in either payment, retake the property and that "any amount that may have been paid . . . shall be considered payment for the use of the machinery . . . ." The purchaser defaulted after payment of two notes, and the seller replevied the machinery. In an action brought to collect the balance of the purchase price, the court held that the repossession *was not* a rescission of the contract and resort to the property was for the purpose of securing the purchase price in pursuance to the contract. In affirming the action of the lower court the Supreme Court stated:[45]

> "In the case before us the seller merely resorted to the thing sold to make it available as a security for the note due and not paid. *He did not claim the right to the press and the money too,* but to make what he could by a sale of the press at public outcry after due notice, and hold the maker of the contract to pay the balance." (Emphasis added).

Upon a close analysis of the language emphasized in the two excerpts above, it is submitted that it does not stretch the rules of interpretation to suggest that in both the *Tufts* case and the *Dederick* case the Court was anticipating an instance in which the conditional vendor claims the absolute title to the repossessed property (not merely a security interest alone) *and* the right to retain the partial payments

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43 70 Miss. at 58, 11 So. at 793.
44 68 Miss. 500, 9 So. 350 (1891).
45 68 Miss. at 505, 9 So. at 351.

that had already been made by the vendee. It is important to note that in neither case had there been a rescission of the contract, but merely a repossession by the vendor for the purpose of enforcing his security interest.

It is urged that the *Duke,* the *Tufts,* and the *Dederick* cases not only served as an entree in Mississippi for litigation commenced in equity to prevent forfeitures under a contract of conditional sale, but the *Tufts* case went even further and gave a clear insight as to what the proper results should be when such an issue did arise.

IV. Conclusion

Calling attention to the fact that the dangers and inequalities of forfeitures are present in no less degree in conditional sale contracts than they are in mortgages, *Williston* suggests that the dilemma created by the conflict between the right to contract for forfeitures and equity's abhorence of the same can best be resolved by recognizing that the essential characteristic of the conditional sale transaction "is the same as that of an absolute sale with a mortgage back."[46] This would create a situation similar to the mortgagor - mortgagee relationship with its entourage of equitable principles designed to alleviate against forfeitures regardless of the provisions of the mortgage. Since Mississippi has long been an exponent of the view that the conditional sale transaction is nothing more than a security arrangement,[47] it would appear that a firm foundation exists in this jurisdiction for the application of the theory advanced by *Williston.*

The Court's interpretation of the office of the conditional sale contract, and the ancillary duty imposed thereunder upon the vendor to act with due regard for the vendee's equitable rights, coupled with the dicta that are illustrative of the Court's attitude toward forfeitures, lead one to conclude that when the proper factual situation is directly presented to the Mississippi Court an adequate and authoritative basis could and would be found for equitable intervention to prevent an unconscionable forfeiture, notwithstanding the existence of a forfeiture clause.

James F. McKenzie

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[46] 3 Williston, Sales § 579d (Rev. ed. 1948).
[47] See note 35 supra.

STATE JURISDICTION UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT

I. Introduction

It may be stated at the outset that the principal premise of this comment is that the Federal act under consideration[1] supersedes state laws—constitutional, statutory, or common—which relate to the liability of an interstate carrier by rail for injury to its interstate employees.[2] As readily seen from the Act,[3] the state courts have concurrent jurisdiction with the courts of the United States and any action under the act may be tried in a state court.[4] It has been held[5] that in actions in the state courts under the FELA, the federal law—both statutory and decisional—governs as to the substantive rights, while the *lexi fori* governs as to matters relating to practice and procedure. The theme of this paper, therefore, centers around the question of whether matters arising under such actions are of substance or procedure.

II. Applicability of State Statutes

The first conflict arising in Mississippi concerned the applicability of the state's "prima facie" statute[6] which provides that proof of injury from the running of an engine propelled by steam is prima facie evidence of negligence, and that the defendant must show facts and circumstances surrounding the occurrence to absolve itself of negligence. In 1916, the Mississippi Court, in a per curiam memorandum decision in the case of *New Orleans & N. E. R. Co. v. Harris,*[7] affirmed the Circuit Court of Lauderdale County and applied the prima facie statute in an action under the FELA. This case was folowed in 1917 by two decisions[8] which also approved of the application of the statute—the court stating in the *Scarlet* case that the section "deals not with a substantive right, but only a rule of evidence, and, since the *lex fori* governs in all matters of procedure, the court below committed no error in charging the jury in acordance therewith."

All three of these cases were subsequently appealed to the United States Supreme Court, and, in 1918, that Court reversed the Mississippi Court in the case of *New Orleans & N. E. R. Co. v. Harris.*[9] There it

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[1]Employers' Liability Act, 35 Stat. 65-66 (1908), 45 U.S.C. §§ 51-60 (1952).

[2]Mondou v. New York N. H. & H. R. Co., 223 U.S. 1 (1912); Yazoo & M. V. R. Co. v. Mullins, 249 U.S. 528 (1919). But the act does not have the effect of rendering state statutes refering to carriers generally invalid; it merely limits their application to intrastate business, Boston & M. R. Co. v. Armburg, 285 U.S. 234 (1932).

[3]Employers' Liability Act § 6, 33 Stat. 66 (1908), 45 U.S.C. § 56 (1952), ". . . The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states."

[4]Where, however, the state statute forbids the prosecution of an action to recover damages on account of death occurring outside the state, the state court has no jurisdiction of an action under the federal statute. Walton v. Pryor, 276 Ill. 563, 115 N.E. 2 (1916), *writ of error dismissed* 245 U.S. 675 (1918).

[5]Illinois Central R. Co. v. Johnston, 205 Ala. 1, 87 So. 866 (1920), *cert. denied* 254 U.S. 654 (1921); Central Vt. Ry. v. White, 238 U.S. 507, 511 (1915).

[6]Miss. Code Ann. § 1741 (1942).

[7]71 So. 913 (Miss. 1916).

[8]New Orleans & N. E. R. Co. v. Scarlet, 115 Miss. 285, 76 So. 265 (1917); Yazoo & M. V. R. Co. v. Mullins, 115 Miss. 343, 76 So. 147 (1917).

[9]247 U.S. 367 (1918).

was said that negligence is an essential fact to recovery and must be established by the plaintiff. The question of burden of proof is a matter of substance, and not subject to control by laws of the several states.[10] Reversals in the *Scarlet*[11] and *Mullins*[12] cases followed shortly, and it would seem firmly established that Mississippi's prima facie statute has no place under the Federal Employers' Liability Act.[13] The Mississippi Court acquiesced in this determination in *Yazoo & M.V.R. Co. v. McCaskell*[14] and *New Orleans & N. E. R. Co. v. Hanna*,[15] where recoveries based on the statute were reversed with the *Harris* case cited as authority.

A somewhat similar question arose in the case of *New Orleans & N. E. R. Co. v. Jackson*[16] in connection with Mississippi Code of 1942, Section 1697, which provides that all disclosures by patients to physicians are privileged and cannot be disclosed except at the instance of the patient. The facts of the case show that the statute operated to exclude testimony of a physician as to the extent of plaintiff's injuries. In the Supreme Court, the defendant railroad contended that the operation of the statute was substantive in effect[17] and no more applicable than the prima facie statute. The court, however, distinguished the operation of the privileged communications statute, in that the latter statute made it possible for the plaintiff to recover without proving negligence, an essential to recovery under the common law as administered by the federal courts. The privileged communications statute, however, does not affect the substantive rights and obligations of the parties—it is a statute affecting only the competency of certain witnesses. The particular point has never been passed on by the United States Supreme Court, but it would seem to be firmly established in Mississippi jurisprudence.

Section 1464 of our Code[18] has been held applicable, in suits under the FELA, as to the sufficiency of the declaration in stating a cause of action. The statute provides that if a declaration "contains sufficient matter of substance for the court to proceed upon the merits of the

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[10]What constitutes negligence making a railroad liable in damages under the FELA is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes, and is governed by federal decisional law. Erie v. Thompson, 337 U.S. 163 (1949); Rogers v. Missouri Pacific R. Co., 352 U.S. 500 (1957).

[11]249 U.S. 528 (1919).

[12]249 U.S. 53 (1919).

[13]Similar statutes were held inapplicable in: St. Louis, I. M. & S. R. Co. v. Steel, 129 Ark. 520, 197 S.W. 288 (1917); Louisville & N. R. Co. v. Rhodes, 74 So. 19 (Fla. 1917); Louisville & N. R. Co. v. Kemp, 140 Ga. 657, 79 S.E. 558 (1913); Palmer v. Wichita Falls & N. W. R. Co., 60 Okla. 205, 159 P. 1115 (1916).

[14]118 Miss. 629, 79 So. 817 (1918).

[15]118 Miss. 40, 78 So. 853 (1918).

[16]145 Miss. 702, 110 So. 586 (1926).

[17]". . . The Supreme Court of the United States promptly declared that [the prima facie statute] could have no application to cases arising under the Federal Employers' Liability Act, because it affected the substantial rights of the parties . . . . By the same reasoning we submit that our privileged communications statute affects a matter of substance, even though it be classified as a mere rule of evidence." Brief of appellant, New Orleans & N. E. R. Co. v. Jackson, id. at 588.

[18]Miss. Code Ann. § 1464 (1942).

case, it shall be sufficient." In *Ross v. Louisville & N. R. Co.*[91] the Mississippi Court held that such a question was one of procedure and a proper case for the application of state law. A Minnesota statute which gives the attorney a lien upon the cause of action for his services[20] was held to apply to a cause of action under the FELA.[21] State rules as to the direction of verdicts have been held applicable,[22] as well as state practice regarding judgments notwithstanding the verdict.[23]

Section one of the Act[24] enumerates the beneficiaries who may recover in the event of the trainman's death and provides for "the next of kin dependent on such employee." However, the statute contains no definition of the persons who constitute the "next of kin." Since the persons who are next of kin are determined by legislation in the various states, it would seem clear that the absence of a definition indicates a purpose to leave the determination of that question to state law.[25]

By Mississippi Code of 1942, Section 622, the executor or administrator of an estate, appointed in a foreign jurisdiction, must file a certified copy of his foreign appointment with the chancery clerk of the county in which he expects to sue, along with ancillary letters of administration. In *Gulf, M. & N. R. Co. v. Wood*[26] our Court held that the administratrix of the estate of a deceased railroad employee, who was appointed in Tennessee, did not have to comply with the terms of section 622. The court said that the federal statute controls in every substantive particular, and that this includes the party in whom the cause of action is vested. When the plaintiff shows that he has been legally appointed as the personal representative of the estate by a court having competent jurisdiction, then the person so appointed may sue in Mississippi under the FELA, and ancillary letters or compliance with section 622 is not necessary.

Section four of the Federal Employers' Liability Act[27] provides, in part, that an employee shall not be held to have assumed the risks of his employment where the violation by the carrier of any statute enacted for the safety of employees contributes to the injury. In 1925 a case arose from the death of a railroad employee in the yards at Cleveland, Mississippi.[28] The plaintiff contended that the defendant railroad had violated Mississippi Code of 1942, Section 7770, by kick switching its cars, and, therefore, the defense of assumption of risk was not open to the defendant. The Fifth Circuit Court of Appeals held, however, that Section 4 of the FELA refers only to acts of Congress and not to the acts of state legislatures.[29] It would seem, nevertheless, that viola-

19178 Miss. 69, 172 So. 75 (1927); in accord, Renn v. Seaboard Air Line R. Co., 170 N. C. 128 (1915).

20Gen. Stats. § 4955 (1913).

21Dickinson v. Stiles, 246 U.S. 631 (1918).

22Dutton v. Atlantic Coast Line R. Co., 104 S.C. 16, 88 S.E. 263 (1916).

23Marshall v. Chicago, R. I. & P. R. Co., 133 Minn. 460, 157 N.W. 638 (1916).

24Employers' Liability Act § 1, 35 Stat. 65 (1908), 45 U.S.C. § 51 (1942).

25Seaboard Air Line R. Co. v. Kenney, 240 U.S. 489 (1916); Taylor v. Taylor, 232 U.S. 363 (1914); Meisenhelder v. Chicago & N. W. R. Co., 170 Minn. 317, 213 N.W. 32 (1927); Poff v. Pennsylvania R. Co., 327 U.S. 399 (1946).

26164 Miss. 765, 146 So. 298 (1930).

27Employers' Liability Act § 4, 35 Stat. 66 (1908), 45 U.S.C. § 54 (1942).

28Gilmer v. Yazoo & M. V. R. Co., 4 F.2d 963 (5th Cir. 1925), *cert. denied* 268 U.S. 705 (1925).

tion of such a state statute would tend to indicate negligence on the part of the employer.

When injury results from a violation of the Federal Safety Appliance Act or other Congressional legislation for the protection of railroad workers, neither assumption of the risk, nor contributory negligence is available as a defense to the employer.[30] It has been held, in fact, that such defenses are not available even though the contributory negligence on the part of the employee amounts to a criminal offense or a misdemeanor under state laws.[31]

III. Applicability of State Common Law

Prior to the 1939 amendment to the Act[32] which abolished the defense of assumption of risk, that defense was available to the employer. Different rules as to the defense are applied in the several states, and consequently the question arose as to which was the proper rule to be applied under the FELA. Missouri, in particular, held that the term "assumption of risk" must be construed according to the common law of the various states. Missouri applied its own rule[33] in numerous cases.[34] This controversy was ended, however, by the decision of *Pryor v. Williams*,[35] when the Supreme Court of the United States held that the federal rule[36] would apply in all cases under the FELA. It seems that Mississippi has consistently followed the correct rule because our Court has stated that risks created by the master's negligence are not assumed by the servant unless, with the actual or constructive knowledge thereof, he voluntarily enters or continues in the employment of the master.[37]

Another problem, which confronted some jurisdictions, was upon whom to cast the burden of showing contributory negligence or the absence thereof. In Vermont the plaintiff is saddled with the burden of showing not only that the defendant was negligent but also that he was free of any negligence himself. The Supreme Court of the United States, in *Central Vt. R. Co. v. White*,[38] held that the burden of proof in such instances was a part of the substance of the case, and not a mere

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29The Supreme Court gave its approval to this limitation in Seaboard Air Line R. Co. v. Horton, 233 U.S. 492 (1914).

30Alabama & M. V. Ry. Co. v. Dennis, 128 Miss. 298, 91 So. 4 (1922).

31Spokane & I. E. R. Co. v. Campbell, 241 U.S. 497 (1916).

32Act of Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

33An employee never assumes the risk of the employer's negligence, even if he has knowledge thereof and appreciates the risk arising therefrom.

34Hawkins v. St. Louis & S. F. R. Co., 189 Mo. App. 201, 174 S.W. 129 (1915); Holloway v. Missouri, K. & T. R. Co., 276 Mo. 490, 208 S.W. 27 (1918); Williams v. Pryor, 272 Mo. 613, 200 S.W. 53 (1917).

35254 U.S. 431 (1920).

36The federal rule as to assumption of risk is that when an employee knows of a defect and appreciates the risk that is attributable to it, then, if he continues in the employment without objection, or without obtaining from his employer or his representative an assurance that the defect will be remedied, the employee assumes the risk, even though it arises from the master's breach of duty. Seaboard Air Line R. Co. v. Horton, 233 U.S. 492 (1914).

37Yazoo & M. V. R. Co. v. Dees, 121 Miss. 439, 83 So. 613 (1920); Gulf & S. I. R. Co. v. Hales, 140 Miss. 829, 105 So. 458 (1925).

38238 U.S. 507 (1915); in accord, Crugley v. Grand Trunk R. Co., 79 N.H. 276, 108 Atl. 293 (1919); Holmberg v. Lake Shore & M. S. R. Co., 188 Mich. 605, 155 N.W. 504 (1915).

rule of procedure; therefore, the federal rule was applicable and the burden of showing contributory negligence was cast upon the defendant.[39]

The Mississippi Court was in error when it approved an instruction to the jury that a railroad was under an absolute duty to furnish its employees a safe place in which to work.[40] The Supreme Court of the United States, reversing the Mississippi Court, held that the duty was not absolute, but that the railroad must use only reasonable care.

The basis for the admission of expert opinions is a procedural matter and is therefore subject to the rules laid down for its admission in the several states.[41] The *Clay* case holds that whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved and not themselves presumed.[42]

In *Gulf & S. I. R. Co. v. Hales*,[43] the jury returned a verdict for the plaintiff after the court refused to direct a verdict for the defendant. On appeal, judgment was reversed and final judgment rendered for the defendant over the plaintiff's objection that the seventh amendment[44] was applicable and prohibited such a re-examination of the facts tried by the jury. The Mississippi Court held that the FELA does not operate to extend the application of the seventh amendment to state courts. The practice in Mississippi, of rendering a final judgment in the Supreme Court for the appellant in a case where the trial court should have directed a verdict for him, is a matter of practice and procedure, and does not abridge the substantive rights of the parties under the FELA.

The question of the proper measure of damages is inseparably connected with the right of action, and it must be settled according to general principles of law as administered by the federal courts, unaffected by state legislation or the decisions of state courts.[45] This doctrine was applied in Mississippi in *Illinois Central R. Co. v. Humphries*.[46] In the first trial of the case, the defendant attempted to show that the deceased assumed the risk of hitting a pile of cinders, since the pile had been there four or five months. Other evidence was introduced to the effect that the pile had been there only a few days. The jury found for the plaintiff. The Supreme Court affirmed the finding as to liability but reversed as to damages.[47] On the subsequent trial, for recomputation of damages, the defendant sought to introduce the same evidence to show that deceased was contributorily negligent. The trial court refused to admit such evidence and for that reason was re-

[39]Mississippi follows the federal rule and holds that "contributory negligence is an affirmative defense and the burden of proving it is upon the defendant," Johnson v. Howell, 213 Miss. 195, 56 So. 2d 491 (1952); Railway Express Agency v. Mullory, 168 F.2d 426 (5th Cir. 1948), *cert. denied* 335 U.S. 824 (1948).

[40]Yazoo & M. V. R. Co. et al. v. Mullins, Admin., 249 U.S. 53 (1919).

[41]Mobile & O. R. Co. v. Clay, 156 Miss. 463, 125 So. 819, *cert. denied* 282 U.S. 844 (1930).

[42]See note 41 supra.

[43]140 Miss. 829, 105 So. 458 (1925).

[44]U. S. Const. amend VII.

[45]Chesapeake & O. R. Co. v. Kelly, 241 U.S. 485 (1916); Layhils v. Kansas City So. R. Co., 225 Mo. 459, 205 S. W. 3 (1918).

[46]174 Miss. 459, 164 So. 22 (1935).

[47]Illinois Central R. R. v. Humphries, 170 Miss. 840, 155 So. 421 (1934).

versed again. The majority held that the jury finding in the first trial on the evidence of assumption of the risk was not res adjudicata as to the same facts offered to show contributory negligence. The FELA requires that in a second trial for damages all the elements of damages be left as fully opened as on the first trial. Justice Ethridge dissented on the ground that the jury necessarily found in the first trial that the fact averred by the defendant was not true and, therefore, the parties are bound in the subsequent trial to that fact. The United States Supreme Court would seem to be in accord with the majority opinion, for in *Norfolk Southern R. Co. v. Ferebee*[48] they held such a matter to be a substantive right and stated, "Damages and contributory negligence are so blended and interwoven, and the conduct of the plaintiff at the time of the accident is so important a matter in the assessment of damages, that the instances would be rare in which it would be proper to submit to a jury the question of damages without also permitting them to consider the conduct of the plaintiff at the time of the injury."

St. Louis - San Francisco Ry. Co. v. Dyson[49] shows another variance in trial procedure in this state when the FELA is applicable. In the trial court an instruction was given which authorized a recovery "not to exceed the amount of $55,450.00, the amount sued for." The Mississippi Court disapproved of the instruction and warned that such might endanger a verdict in this state, but held that the computation of damages is to be governed by the federal law. The Supreme Court of the United States has held that the words here criticised could only have been understood as setting a limit beyond which the jury could not go, and, so long as the court demands of the jury that there be a proximate and casual relation between the damages and the negligence of the defendant, there is no error in referring to the limit stated in the declaration.[50] Here then is a practice condemned by our Court which is acceptable in a suit under the FELA.

The United States Supreme Court has limited its consideration of writs of error from highest state courts to matters involving the substative rights given under the FELA.[51] Matters of pleading, admissibility of evidence, sufficiency of exceptions, and various rulings of the trial court which involve no construction of the Federal Employers' Liability Act cannot be considered on appeal from the state courts.

IV. Conclusion

Whether a particular practice is to be governed by state or federal rules is still open to question. A great amount of litigation has failed to establish any clear-cut formula for determining the applicable rule in all cases. The statement that "all matters which affect substance" are to be governed by the federal act and federal interpretation thereof is unsatisfactory, for that phrase itself must be interpreted. It is clear that substance includes: the party on whom the burden of proving negligence and contributory negligence is placed, the persons in whom

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48238 U. S. 269 (1915).

49207 Miss. 639, 43 So.2d 95 (1949).

50Norfolk & Western R. Co. v. Earnest, 229 U.S. 114 (1913).

51Central Vt. R. Co. v. White, 238 U.S. 507 (1915); New Orleans & N. E. R. Co. v. Harris, 247 U.S. 367 (1918).

the action is vested, the interpretation of the defense of assumption of risk, the defining of what constitutes a safe place in which to work, the application of the defense of contributory negligence, and the rules for computing damages. It does not include: the right to exclude privileged communications, the determination of the deceased's heirs, the applicability of state statutory liens on judgments, statutory rules as to the sufficiency of the declaration, the basis for the admission of expert opinions, and rules as to the direction of verdicts in the appellate court. However, the distinction between some of these factors is not clear.

A complete outline of the correct procedure in such cases is yet to be seen, but a workable method can be gleaned from the various decisions on the subject.

Edward E. Laird, Jr.

RECENT DECISIONS

CONSTITUTIONAL LAW — CONSTITUTIONALITY OF EXPATRIATION LAW

Petitioner, a native born American, was taken to Mexico by his parents when about eleven years of age. Though he was informed of his American birth in 1928, at the age of nineteen, petitioner remained in Mexico and was married there. Petitioner admits remaining out of the United States during World War II in order to avoid the draft, though he did enter twice as a wartime alien laborer for short periods of time. Petitioner also admits voting in a Mexican national election. In 1954 petitioner brought suit before a United States District Court seeking a declaratory judgment of his citizenship. Petitioner appeals from a finding that he had expatriated himself by his actions on the grounds that Section 401 (e) and 401 (j) of the Nationality Act of 1940, 54 Stat. 1137, as amended by 58 Stat. 746 (1944), are unconstitutional.[1] HELD: That section of the Nationality Act of 1940 providing that a person who is a national of the United States shall lose his nationality by voting in a political election in a foreign state is a constitutional exercise of Congress' power to regulate relations of the United States with foreign countries, *Perez v. Brownell,* 78 Sup. Ct. 568 (1958).[2]

Prior to 1775, the doctrine of perpetual allegiance was well established in English law.[3] The American Revolution destroyed this doctrine, for this act amounted to mass self-expatriation.[4] As a consequence of the revolution and the continuing need for new citizens in the rapidly expanding nation, the early American legal philosophers came to consider self-expatriation as a basic human right.[5] This view was finally crystallized into legislation in 1868 when Congress declared the right of self-expatriation to be "a natural and inherent right."[6] This act of Congress was designed only to protect naturalized citizens from their foreign sovereigns, but the Act was construed as implying that United

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[1]Original action was brought in the U. S. District Court for the Northern District of California, Southern Division. From an adverse judgment, petitioner appealed. The Court of Appeals affirmed the decision, 235 F.2d 364, and petitioner brought certiorari. See also, case notes, 18 Univ. of Pitt. L. Rev. 816, 42 Minn. L. Rev. 486.

[2]Petitioner was denied citizenship under Section 401 of the Nationality Act which provides that "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

"(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

" . . . .

"(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."

The court declined to consider the constitutionality of subsection (j).

[3]Calvin's Case, 7 Coke 1 (1608).

[4]The term *self-expatriation* has been adopted for the use of this case note to differentiate a purely voluntary act of expatriation from a forced divestment of citizenship *as the result of a voluntary action,* such divestment to be labeled *expatriation.*

[5]See Tsiang, The Question of Expatriation in America Prior to 1907, pp. 25, 40-43, 69. See also Wooldridge v. Wilkens, 3 How. 360 (Miss. 1838).

[6]15 Stat. 223 (1868).

States citizens, both naturalized and native-born, could divest themselves of their United States citizenship.[7] The right of Congress to enumerate acts which would divest one of his citizenship, seems not to have been questioned throughout this period. Rather, the courts and the executive departments took for granted the power of Congress to enact such legislation.[8] Finally, in 1907, Congress set forth the acts by which an American citizen might be deemed to have expatriated himself.[9] Until the 1930's the few cases concerning expatriation were concerned with those citizens who (1) married foreign male citizens,[10] and (2) were taken, as children, back to their parent's homeland.[11] In 1940 the Nationality Act, under whose provisions the instant case arose, was passed as a result of a thorough study of the subject by a committee appointed by President Roosevelt. At this time there was still little concern over Congress' power to enact legislation governing expatriation, the members of the committee feeling certain that Congress could "make certain acts result in a loss of citizenship."[12] Following World War II, a number of cases arose involving the citizenship of former United States citizens of Japanese and Italian descent who had served in foreign armies and voted in foreign elections. At this time the constitutionality of section 401 came to be questioned. The major issue raised by these cases was the constitutional right of Congress to adopt legislation which will so operate as to deprive one of the citizenship granted him by the United States Constitution.[13]

In the instant case, the court has upheld the right of Congress to prescribe conditions for breach of which a citizen forfeits his citizenship. The court has ruled that this power is derived from the "necessary and proper" clause of the Constitution in connection with the right to regulate foreign affairs as set forth in the Constitution.[14] In so

[7]Op. Att. Gen., XIV, 295-296 (1873).

[8]Tsiang, op. cit. supra at 104. "Presidents Grant, Cleveland, Harrison, and Roosevelt repeatedly urged Congress to define the acts by which a citizen might be deemed to have lost or forfeited his citizenship." And see, Comitis v. Parkerson, 56 Fed. 556 (1893). ". . . the courts must carefully observe the lines of demarcation which the Congress has drawn; that any imperfections or inconsistencies in those lines must be supplied and corrected by Congress and not by the courts."

[9]Act of March 2, 1907. This act sets forth means by which an American citizen might be deemed to have expatriated himself including, (1) Naturalization abroad, (2) Service to a foreign state involving an oath of allegiance, (3) Domicile abroad for over five years with no intent to return.

[10]Mackenzie v. Hare, 239 U.S. 299 (1915).

[11]Perkins v. Elg, 307 U.S. 325 (1939).

[12]Hearings before the House Committee on Immigration and Naturalization on H. R. 6127, 76th Cong., 1st Sess. There was some debate at this time whether the term "political election" might not be too broad in that voting in *any* political election does not necessarily indicate a renunciation of allegiance to the United States.

[13]Okimura v. Acheson, 99 F. Supp. 587 (1953), and Terada v. Dulles, 121 F. Supp. 6 (1954), where Justice McKenzie states, "The power of naturalization which Congress has under the Constitution is a power to confer citizenship, not a power to take it away."

[14]U.S. Const. art. I, § 8, cl. 18; U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). The theory behind the ruling in the instant case comes directly from the reasoning of Justice Sutherland in the Curtiss-Wright case. It has been said in respect to Justice Sutherland's approach, "There is even considerable basis for interpreting the Curtiss-Wright opinion to mean that there are no substantive limitations on the scope of the foreign relations power; that is, since it is an 'extra-constitutional' power, extra-constitutional acts cannot be unconstitutional." See 55 Yale L.J. 490.

ruling, the court has extended the sovereign power of the government to a degree which might appear frightening upon reflection. Certainly the judges dissenting in the instant case show great concern over the possibility that this power might be abused by Congress in future legislation.[15] But in their dissenting opinions these judges all admit that citizenship may be "voluntarily renounced . . . by . . . actions in derogation of undivided allegiance to this country,"[16] and Justice Whittaker, though dissenting with the specific result as applied to the petitioner, agrees with the majority that "Congress may expatriate a citizen for an act which it may reasonably find to be fraught with danger of embroiling our Government in an international dispute or of embarassing it in the conduct of foreign affairs."[17] Thus it would appear that the major disagreement among the court involves not so much the power of Congress to set up "rules" governing expatriation, but rather the text of the "rules" themselves. That the court does not intend to sit idly by and allow Congress to adopt unjust "rules" governing expatriation is clearly indicated by the results of two other expatriation cases handed down the same day as the *Perez* case.[18] In the *Trop* case the court finds Section 401 (c) of the Nationality Act to be unconstitutional as creating "cruel and unusual punishment," though expatriation for war-time desertion had appeared settled by court action in the past.[19] In the *Nishikawa* case the court refused to pass on the constitutionality question at all, but found other means to defeat the government's case for expatriation. In summary, it appears that, while the court has affirmed the long held belief that Congress has the power to set up conditions governing expatriation, notice has been served that these conditions will be strictly construed so as to preclude any possibility of abuse of this power by Congress.

Edwin E. Benoist, Jr.

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[15]Justice Douglas: "What the Court does is to make it possible for any one of the many legislative powers to be used to wipe out or modify specific rights granted by the Constitution, provided the action taken is moderate and does not do violence to the sensibilities of a majority of the Court." 78 S. Ct. at 588.

[16]Justice Warren states, "The citizen may elect to renounce his citizenship, and under some circumstances he may be found to have abandoned his status by voluntarily performing acts that compromise his undivided allegiance to his country." 78 S. Ct. at 581. Justice Douglas states, "While Congress can prescribe conditions for voluntary expatriation, Congress cannot turn white to black and make any act an act of expatriation." 78 S.Ct. at 586.

[17]78 S. Ct. at 590.

[18]Trop v. Dulles, 78 S. Ct. 590, and Nishikawa v. Dulles, 78 S.Ct. 612. In the first case, petitioner, born in the U.S., was convicted in 1944 by a general court-martial of desertion. It was held that Section 401 (g) of the Nationality Act, authorizing expatriation of a person convicted by military court of desertion, was unconstitutional as beyond the war powers of Congress. The Court felt that expatriation in this instance amounted to a punitive measure and as such constituted cruel and unusual punishment. In the second case, the petitioner was of dual citizenship due to his American birth and the Japanese nationality of his parents. He was conscripted under Japanese law in 1941 while visiting that country. It was held that the government had failed to sustain its burden of proving voluntary conduct on the part of petitioner and the constitutionality of Section 401 (c) was not ruled on.

[19]See Kurtz v. Moffitt, 115 U.S. 487 (1885), In re Carver, 142 F. 623 (1906), and U.S. v. Snow, 27 Fed.Cas. 1255 (1887).

CONSTITUTIONAL LAW — FORFEITURE OF AUTOMOBILE USED IN TRANSPORTING NARCOTICS WHEN OWNER IS UNAWARE OF SUCH ACT

The possession of the vehicle on the occasion in question was secured by one Portwood, who represented to Richards, the owner, that he wanted to borrow the vehicle for a few minutes to drive over to his brother's apartment to change clothes. Portwood was arrested a few minutes after leaving the apartment with two dolophine pills in his pocket. The lending of the vehicle was gratuitous. Richards did not know or suspect that Portwood possessed any narcotics, or had ever possessed them. This suit for confiscation of the automobile was brought under a Texas statute[1] which provided for forfeitures of automobiles used in the unlawful transportation of narcotics. HELD: Affirmed. A state has power to confiscate the property of an innocent person used by a lawbreaker without the owner's consent when there has been an entrusting of the property by the owner to another. *State v. Richards*, 303 S.W.2d 393 (Tex. 1957).

It has long been the settled law that the owner of a vehicle, who has given consent to its operation by another, is not deprived of any constitutional right by the forfeiture of his property on account of the operator's violation of a statute even though such owner is without knowledge of or has failed to acquiesce in its illegal use.[2] The right of the government to enforce a forfeiture is not dependent on personal guilt of the owner, but the vehicle is condemned as the offender and becomes subject to seizure and forfeiture upon its use in violation of express provisions of the statute.[3] Because the policy of the law is to enforce rigid punishment for certain offenses, and because forfeiture is in rem, directed against the property seized, the courts have upheld forfeiture of property used for illegal purposes although the user was acting without knowledge of the owner.[4] The doctrine that the property of innocent owners, entrusted to persons who use it in violation of law, may be forfeited applies not only to federal law, but to the statutes of the various states. It is within the police power of a state to confiscate the property of an innocent person used by a lawbreaker without the owner's consent when there has been an entrusting of the property by the owner to another.[5] The purpose of the statutes is to curb the narcotics traffic,

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[1]Vernon's Ann. P. C., art 725 d.

[2]People v. One 1941 Ford 8 Stake Truck, 151 P.2d 895 (Cal. 1944); Van Oster v. Kansas, 272 U.S. 465 (1926); People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 503, 159 P.2d 641 (1945); People v. One 1937 Plymouth, 37 Cal.2d 65, 98 P.2d 750 (1940); People v. One 1933 Plymouth, 13 Cal.2d 565, 90 P.2d 799 (1939); People v. One 1937 Buick, 89 Cal.2d 556, 201 P.2d 402 (1949); People v. One 1940 Chrysler, 77 Cal.2d 306, 175 P.2d 585 (1946); People v. One 1940 Ford V-8, 36 Cal.2d 471, 224 P.2d 677 (1950); People v. One 1940 Buick Sedan, 71 Cal.2d 160, 162 P.2d 318 (1945); State v. Roberts, 36 W. Va. 391, 68 S.E.2d 48 (1951); Quidley v. Commonwealth, 190 Va. 1029, 59 S.E.2d 52 (1950); People v. One 1951 Ford Sedan, 122 Cal. App. 2d 680, 265 P.2d 176 (1954); People v. One 1949 Cadillac, 126 Cal. 2d 410, 272 P.2d 873 (1954).

[3]49 U.S.C. 781; United States v. One 1948 Cadillac Convertible Coupe, 115 F. Supp. 723 (1953); United States v. One 1951 Cadillac Coupe DeVille, 108 F. Supp. 286 (1952); United States v. One 1951 Oldsmobile Sedan, 135 F. Supp. 873 (1955).

[4]Commonwealth v. Certain Motor Vehicle, 261 Mass. 504, 159 N.E. 613 (1928).

[5]People v. Chevrolet Convertible Coupe, 45 Cal.2d 613, 290 P.2d 538 (1955); Phariss v. Kimbrough, 118 S.W.2d 661 (Tex. Civ. App. 1938); Skipper-Bivens Oil Company v. State, 115 S.W.2d 1016 (Tex. Civ. App. 1938).

and the public interest to be protected outweighs the loss suffered by those whose confidence in others proves to be misplaced.[6] By entrusting the vehicle to another, the owner accepted the risk that it would be used contrary to law. However, to justify forfeiture of property there must be some connection, either by agency, consent to operate or control the vehicle, knowledge or negotiation between the owner of the seized vehicle and person committing the crime.[7] The owner of an automobile may deny others the right to use it and his rights are protected unless he does entrust it to another.

Although it may seem that the statute in question produces a harsh result in the present case, such legislation is necessary to combat the illegal traffic in narcotics with its disastrous effects upon the public. Any provision for the protection of the property rights of innocent owners would afford an easy means of evading the law. If an automobile used in transporting narcotics could be protected from the law by showing that the legal title was in someone else, then drugs would usually be transported in automobiles belonging to others. The owner of an automobile may easily avoid forfeiture by refraining from lending it. Considering the difficulty of enforcing the law if loaned vehicles were protected, it is submitted that this type of statute will continue to be upheld.

George P. Cossar, Jr.

CONSTITUTIONAL LAW — INTERGOVERNMENTAL IMMUNITY

The Murray Corporation brought action against the City of Detroit and the County of Wayne to recover taxes, assessed by authority of statute,[1] on the value of property which belonged to the United States Government, but which was in the possession of Murray Corporation to be used in carrying out a contract with the Government. The United States intervened, claiming title to the property assessed. HELD: Though the tax was styled a "personal property tax" and though the taxing statute did not expressly state that the person in possession was being taxed for the privilege of storing or using Government property, there was no infringment of the federal government's constitutional immunity since the tax was in fact a privilege tax and not a tax upon the property itself.[2] (5-4) *City of Detroit v. Murray Corporation of America,* 78 S. Ct. 458 (1958).

Since *McCulloch v. Maryland,*[3] decided almost 150 years ago, it has been a well established principle of constitutional law that the property of the federal government, its agencies and instrumentalities, are immune from direct taxation by a state government. The basis of

[6]People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 503, 508, 159 P.2d 641 (1945).
[7]People v. One 1941 Buick Sport Coupe, 28 Cal.2d 692, 171 P.2d 719 (1946).

[1]The relevant statutory provisions are set forth in full in 6 Mich. Stat. Ann. §§ 7.1 - 7.234, 7.81 (1950), and 6 Charter, City of Detroit, c. II § 1, c. IV §§ 1, 7, 26, 27.
[2]Reversing 132 F. Supp. 899 (E.D. Mich. 1955); and 234 F.2d 380 (6th Cir. 1956).
[3]17 U.S. (4 Wheat) 316 (1819).

the doctrine is said to arise from the necessity of preserving the dual system of the federal and state governments under our Constitution.[4] However, within the past two decades, it has been the tendency of the Court sharply to curtail the doctrine of constitutional immunity.[5] Salaries of governmental officials, both state[6] and federal,[7] have been removed from within the circle of immunity. Exemption from a tax levied on the income a lessee derives from a lease of government owned and controlled land is no longer tenable.[8] Privilege taxes which are assessed to contractors of the federal government are not objectionable,[9] for "mere contracts between private corporations and the United States do not necessarily render the former essential governmental agencies and confer freedom from state control."[10] This is true even though the amount of the tax to be levied is measured by the value or amount of tax-exempt property.[11] Not only has the Court tended to narrow the application of the doctrine, it has also limited the grounds upon which a tax may be invalidated, for it is now accepted that the mere fact that the federal government may ultimately bear all or a part of the economic burden of a tax which a state may impose upon a third person who is doing business with the federal government is not a sufficient reason to hold the tax invalid.[12] The effect of this modern judicial trend is to allow the states to accomplish by indirect methods that which would be impossible if done by direct methods. It seems evident that the Court is following a line of form rather than substance, for in any event the economic burden which is ultimately borne by the Government is the same, whether the tax is charged to the contractor who in turn may simply add the tax burden to the contract price, or whether the tax is imposed directly against government property as such.[13] This fact seems to substantiate a conclusion that Mr. Chief Justice Marshall's famous dictum in *McCulloch v. Maryland*[14] has failed to impress the

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[4]Metcalf & Eddy v. Michaell, 269 U.S. 514 (1926); Western Lithograph Co. v. State Board of Equalization, 11 Cal.2d 156, 78 P.2d 731 (1938); see McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819); Davis v. Elmira Savings Bank, 161 U.S. 275 (1896); Helvering v. Powers, 293 U.S. 214 (1934).

[5]For a comprehensive study of the doctrine of intergovernmental tax immunity see Powell, The Waning of Intergovernmental Tax Immunity, 58 Harv. L. Rev. 633 (1945); Powell, The Remnant of Tax Immunity, 58 Harv. L. Rev. 757 (1945).

[6]Helvering v. Gerhardt, 304 U.S. 405 (1938).

[7]Graves v. New York ex rel O'Keefe, 306 U.S. 466 (1939).

[8]Helvering v. Mountain Producers Corp., 303 U.S. 466 (1938); Choteau v. Burnet, 283 U.S. 691 (1931); Leatty v. State Treasurer, 297 U.S. 420 (1936).

[9]See e.g. James v. Dravo Contracting Co., 302 U S. 134 (1937); Esso Standard Oil Co. v. Evans, 345 U.S. 495 (1953); United States v. City of Detroit, 73 S. Ct. 474 (1948); Annot., 95 ALR 1257 (1935); 144 ALR 347 (1938).

[10]Fidelity & Deposit Co. v. Pennsylvania, 240 U.S. 319 (1916); also see Alabama v. King & Boozer, 314 U.S. 1 (1941); Esso Standard Oil Co. v. Evans, supra note 9.

[11]See note 9 supra.

[12]James v. Dravo Contracting Co., 302 U.S. 134 (1937); Graves v. New York ex rel O'Keefe, 306 U.S. 466 (1939); Alabama v. King & Boozer, 312 U.S. 1 (1941); Curry v. United States, 314 U.S. 14 (1941); Esso Standard Oil Co. v. Evans, 345 U.S. 495 (1953); Federal Reserve Bank v. Department of Revenue, 339 Mich. 587, 64 N.W.2d 639 (1954); United States v. City of Detroit, 78 S. Ct. 474 (1958).

[13]See note 12 supra; also see 58 Harv. L. Rev. 633 (1945).

[14]". . . the power to tax involves the power to destroy." 17 U.S. (4 Wheat) 316, 331 (1819).

Court in recent years.[15] The Court, in extending the state's taxing power, has expressly overruled[16] or completely abandoned[17] an impressive number of earlier decisions, and, in so doing, has tended to obscure the precise limits of implied constitutional immunity, thereby injecting considerable confusion into this field of law.[18] The trend of the past twenty years is probably attributable to the Court's growing recognition of the fact that the United States Congress may afford immunity to its contractors if it desires.[19]

The principal case is certainly in line with the present judicial trend, but appears to go one step further in restricting the federal government's freedom from state taxation, for the statute which conferred authority for the tax clearly created an ad valorem tax on the property of the United States.[20] As is pointed out by Mr. Justice Harlan's dissenting opinion in the principal case, the majority of the Court seems unconcerned with the obvious fact that the tax was on the property of the Government, but considered the problem only from

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15"The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes' pen; 'The power to tax is not the power to destroy while this court sits.'" Graves v. New York ex rel O'Keefe, 306 U.S. 466, 490 (1939) (concurring opinion).

16Collector v. Day, 78 U.S. (11 Wall) 113 (1870) and New York ex rel. Rogers v. Graves, 299 U.S. 401 (1936), overruled in Graves v. New York ex rel O'Keefe, 306 U.S. 466 (1939); Gillespie v. Oklahoma, 257 U.S. 501 (1922) and Burnet v. Coronado Oil and Gas Co., 285 U.S. 393 (1932), overruled in Helvering v. Production Corporation, 303 U.S. 370 (1938); Panhandle Oil Co. v. Mississippi, 277 U.S. 218 (1928) and Graves v. Texas Co., 298 U.S. 393 (1936), overruled in Alabama v. King & Boozer, 312 U.S. 1 (1941).

17Brush v. Commissioner, 300 U.S. 352 (1937); Dobbins v. Commissioner of Erie County, 41 U.S. (16 Peters) 435 (1842). Both of these cases are analogous to Collector v. Day, supra note 16. It must therefore be inferred that these cases have been overruled sub silentio. Wiseman v. Dyers, 189 Ark. 381, 72 S.W.2d 517 (1934); People v. Texas Co., 85 Colo. 289, 275 P. 896 (1929); Graysburg Oil Co. v. Texas, 278 U.S. 582 (1929). These cases are based upon the authority of Panhandle Oil Co. v. Mississippi, supra note 16, and are no longer tenable. United States v. Allegheny County, 322 U.S. 174 (1944), is distinguished both in Esso Standard Oil Co. v. Evans, 345 U.S. 495, 499 (1953) and in the principal case. These fine lines of distinction are pointed out in Mr. Justice Harlan's dissenting opinion in the principal case: "[A]lthough the Court here purports to distinguish Allegheny, it seems to me that the authority of that case has now been reduced almost to the vanishing point . . . ." See also the dissenting opinion of Mr. Justice Whittaker and Mr. Justice Frankfurter in the principal case.

18"Looking backward it is easy to see that the line between the taxable and the immune has been drawn by an unsteady hand." United States v. Allegheny County, 322 U.S. 174, 176 (1944). Compare Esso Standard Oil Co. v. Evans, supra note 17, with Graves v. Texas Co., 298 U.S. 393 (1936). Compare Mr. Justice Holmes' opinion in Gillespie v. Oklahoma, 257 U.S. 501 (1922), that "a tax upon the leases" was "a tax upon the power to make them and could be used to destroy the power to make them . . ." with his dissenting statement in Panhandle Oil Co. v. Mississippi, 277 U.S. 218 (1928) that "The power to tax is not the power to destroy while this court sits." Compare Western Lithograph Co. v. State Board of Equalization, 11 Cal.2d 156, 78 P.2d 731, (1938), with M. G. West Co. v. Johnson, 20 Cal. App. 2d 95, 66 P.2d 1211 (1937), *cert. denied* 302 U.S. 638 (1937).

19In the principal case the majority opinion states: ". . . Congress is the proper agency . . . to make the difficult policy decisions necessarily involved in determining whether and to what extent private parties who do business with the Government should be given immunity from state tax." Also see Carson v. Roane-Anderson Co., 342 U.S. 232 (1952); City of Cleveland v. United States, 323 U.S. 329 (1945).

20See Mr. Justice Whittaker's dissenting opinion in the principal case for a thorough discussion of the Michigan Statute under which the tax was levied.

the point of view of whether the statute could have constitutionally imposed a privilege tax on the Corporation. Acceptance by the Court of such a test, to determine future cases of this type, would very probably result in an increase of Congressional legislation for the purpose of granting tax immunity to contractors performing work for the federal government. It would seem, therefore, that the Court has gone as far as it can go without annihilating *McCulloch v. Maryland,* for the next step is to allow undisguised direct taxation of Government property itself. The Court has always refused to take the final step, and it seems safe to assume that they will continue to do so.

Newt P. Harrison

Domestic Relations — Jurisdiction For Divorce

In an action for divorce brought by the husband, a resident of California, on ground of desertion by the wife, a motion to dismiss for lack of jurisdiction was made by the wife. There was conflicting evidence presented as to whether the wife was sent to Mississippi by her husband, or whether she went of her own accord. At any rate she had physically remained in Mississippi for almost five years at the time the divorce proceeding was commenced. The wife testified that she had maintained her status as a registered voter and as a church member in California, possessing at all times the intent to return to the domicile of her husband. The court granted the divorce decree to the husband. Held: Affirmed. The evidence was sufficient to warrant the conclusion that the wife was a bona fide resident of Mississippi within the meaning of the statute limiting jurisdiction of the court over divorce actions.[1] *Carter v. Carter,* 97 So.2d 529 (Miss. 1957).

The jurisdictional requirement, that one of the parties be a bona fide resident within the state for one year preceding the commencement of the suit, has been consistently interpreted by the Court to mean domiciled within the state for the period of time.[2] This is due to the interpretation placed upon the word "resident" in the divorce statute. The terms "resident" and "domicile" when used in connection with subjects of domestic policy are synonymous.[3] The courts of Mississippi are required to have jurisdiction not only of the persons, but of the marital status,[4] and the jurisdiction of this status is the domicile of either one or both of the parties. Following the common law con-

[1]Miss. Code Ann. § 2736 (1942).

[2]Clay v. Clay, 134 Miss. 658, 99 So. 818 (1924); Hairston v. Hairston, 27 Miss. 704 (1854); Lynch v. Lynch, 210 Miss. 810, 50 So.2d 378 (1951).

[3]Bilbo v. Bilbo, 180 Miss. 536, 177 So. 772 (1938). Some of the other jurisdictions which hold this view are: Caheen v. Caheen, 233 Ala. 494, 172 So. 618 (1937); Darbie v. Darbie, 195 Ga. 769, 25 S.E.2d 685 (1943); Gleason v. Gleason, 159 Kan. 448, 155 P.2d 465 (1945); Levanosky v. Levanosky, 311 Mass. 638, 42 N.E.2d 561 (1942); Maloney v. Maloney, 288 N. Y. 532, 41 N.E.2d 934 (1942); Rogers v. Rogers, 130 F.2d 905 (D. C. Cir. 1942); St. John v. St. John, 291 Ky. 363, 163 S.W.2d 820 (1942); State ex rel. Duckworth v. District Ct., 107 Mont. 97, 80 P.2d 367 (1938); Ungemach v. Ungemach, 61 Cal. App. 2d 29, 142 P.2d 99 (1943); Wyrick v. Wyrick, 162 Mo. App. 723, 145 S.W. 144 (1912).

[4]Antoine v. Antoine, 132 Miss. 442, 96 So. 305 (1923).

cept of husband and wife being one person at law,[5] the general rule is that the domicile of a women when she marries is that of her husband,[6] even though she does not reside there,[7] unless she is abandoned by the husband. When the domicile is established by marriage, it will continue until another is acquired, and it will not be changed until it is clearly evidenced by removal to the new domicile with the abandonment of intent to return to the old.[8] The United States Supreme Court in *Davis v. Davis*[9] stated that where the existence of matrimonial domicile is the basis for the divorce proceeding,[10] and it is being questioned, the court should always use care in determining upon the available information in each case whether, in accordance with the general rule, it is the domicile of the husband. In the past, the above general rules and interpretations in divorce proceedings have been the well-established law in Mississippi.

In the *Carter* case, the court has apparently made an inroad upon the concept of domicile as a jurisdictional basis in divorce proceedings. They are clearly departing from the definition of "bona fide resident" set out in the *Bilbo* case,[11] as being synonymous with domicile, and that the domicile and legal residence of a married woman is that of her husband. Following *Suter v. Suter*,[12] the wife in the *Carter* case could not acquire domicile in Mississippi so as to enable her to bring divorce proceeding against her husband in California, for she, as the trial court found, had deserted him. The trial court upon the finding of this fact could have then dismissed for lack of jurisdiction.[13] This would have, as parties to the divorce proceeding, two persons, neither of whom were domiciled in Mississippi. In a recent New Mexico decision,[14] the court pointed out, in their discussion of a serviceman's divorce statute, the fact that domicile as a jurisdictional basis for divorce is not entitled to constitutional sanctity, even though it is a statutory requirement in the majority of States.[15] It has been suggested that under the modern statutes, changing the status of married women and departing from the common law theory of marriage, there is no reason why a wife may not acquire a separate domicile for every purpose known to law.[16] Whether the Mississippi Court will make further inroads upon the concept of domicile as a jurisdictional basis for di-

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52 Blackstone's Commentaries 433.

6Bilbo v. Bilbo, 180 Miss. 536, 177 So. 772 (1938); Hairston v. Hairston, 27 Miss. 704 (1854); Suter v. Suter, 72 Miss. 345, 16 So. 673 (1895); Weisinger v. McGehee, 160 Miss. 424, 134 So. 148 (1931).

7United States ex rel. Boraca v. Schlotfeldt, 109 F.2d 106 (7th Cir. 1940).

8Lucia v. Lucia, 200 Miss. 520, 27 So.2d 774 (1946).

9305 U.S. 32 (1938).

10The great majority of the States have matrimonial domicile as a basis for divorce proceedings. A concise survey of residence requirements for the forty-eight states is found in Bunkley and Morse's Amis, Divorce and Separation in Mississippi (1957).

11180 Miss. 536, 177 So. 772 (1938).

1272 Miss. 345, 16 So. 673 (1895).

132 Nelson, Divorce and Annulment § 21.08 (2nd ed. 1945).

14Wallace v. Wallace, 320 P.2d 1020 (N. M. 1958).

15"Power or authority of jurisdiction to grant a divorce in this country depends solely upon statute, and is not derived from the common law." Price v. Price, 202 Miss. 268, 32 So.2d 124 (1947).

16Shute v. Sargent, 67 N. H. 305, 36 Atl. 282 (1893).

vorce remains to be seen, for there is no definite statement by the court on this point in the instant case. It seems reasonable that considerations of policy may cause the Court to extend the jurisdictional bases for divorce beyond domicile alone. However, in establishing a liberal jurisdictional basis for divorce, we may run the danger of creating a divorce mill.

Charles M. Deaton

EASEMENTS — CURTAILMENT OF RIGHT OF ACCESS — REGULATION OR PROHIBITION

Appellees own a nine acre tract of land in Jackson, Mississippi, bordered on the east by Highway 51 and on the south by Highway 80 and the clover-leaf. There was a natural division of the property by a creek that separated the tract into two distinct parts. The Highway Commission refused access to either highway from the southern portion in an effort to prevent the creation of additional traffic hazards. The Chancery Court of Hinds County held that the Commission could refuse such access but the landowner must be compensated therefor. Appellant contended that the restriction is a valid exercise of the police power in the interest of public safety. HELD: Affirmed. This is not regulation but a prohibition of all right of access. The right of ingress and egress to an abutting property owner is a property right and cannot be taken without compensation therefor. *Mississippi State Highway Commission v. Spencer,* 101 So.2d 499 (Miss. 1958).

An abutting owner has certain property rights which arise from the ownership of property contiguous to the highway. Such rights are known as easements appurtenant to the land,[1] and consist of access,[2] view,[3] and light and air.[4] Although the precise origin of these rights is somewhat obscure,[5] courts today almost universally recognize their existence. The easement of access includes ingress and egress from the property to the highway in a reasonable manner.[6] Since the right of access is a significant factor in determining the value of the property, a complete denial of access is a taking of property for which just compen-

[1]Morris v. Covington County, 118 Miss. 875, 80 So. 337 (1918); Allen Reed, Inc. v. Presley, 50 R.I. 53, 144 Atl. 888 (1929).

[2]Story v. New York Elevated R.R. Co., 90 N.Y. 122 (1882), is frequently cited as the foundation case for recognizing the right of access.

[3]Brown-Brand Realty Co. v. Saks & Co., 126 Misc. Rep. 336, 214 N.Y.S. 230 (1926); First National Bank of Montgomery v. Tyson, 133 Ala. 459, 32 So. 459 (1920).

[4]Field v. Barling, 149 Ill. 566, 37 N.E. 850 (1894); Townsend v. Eynstein, 93 N.Y. 537, 49 Atl. 629 (1910).

[5]Bachich v. Board of Control, 23 Cal. 2d 343, at 350, 144 P.2d 818 at 823 (1943). Chief Justice Holmes, in his dissent in Muhlker v. New York & Harlem R. R., 197 U.S. 544 at 573 (1904), stated courts could have just as reasonably and logically declared that the private rights of the abutting owner do not exist.

[6]Newman v. Mayor of City of Newport, 73 R.I. 385, 57 A.2d 173 (1948); Bachich v. Board of Control, supra note 5.

sation must be paid.[7] However, the abutting owner's right is subordinate to the right of the state to regulate and control the public highways for the benefit of the traveling public.[8] Regulation of highway traffic has long been recognized as a valid exercise of the police power[9] and a reasonable restriction of the easement of access under the police power is not compensable.[10] Thus the question evolves, where should regulation under the police power[11] end and condemnation by the exercise of eminent domain[12] begin? In determining the answer to this question, courts should weigh the relative interests of the public against those of the individual owner, in order to arrive at a just balance.[13] The State must not be unduly restricted in its proper exercise of the police power in maintaining public safety, while at the same time effect must be given the eminent domain clause[14] to insure against the harsh results of an unreasonable loss to the abutting owner.

Each year an appalling number of automobile accidents contribute directly to the loss of thousands of lives and several million dollars worth of property damage. Statistics show that only 15 per cent of the mishaps on ordinary roads will occur on an equal mileage of limited-access highway.[15] Realizing that limited-access highways save man-hours, remove traffic congestion, and make automobile travel safer, it becomes imperative that such highways be established in the interest of public convenience and necessity.[16]

In order to establish a limited-access highway, the abutting owner's easement of access must be restricted and, in some instances, prohibited.[17] By maintaining too broad a concept of what constitutes a taking of the right of access under the eminent domain clause, future

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[7]39 C.J.S., Highways, § 141; 25 Am. Jur., Highways, § 154; Laurel v. Rowell, 84 Miss. 435, 36 So. 543 (1904); Town of Clinton et al v. Mattie Turner, 95 Miss. 594, 52 So. 261 (1909); Hamilton v. Mississippi Highway Commission, 220 Miss. 340, 70 So.2d 856 (1954). These cases involved the closing of streets thus denying all access.

[8]Sauer v. New York, 206 U.S. 536 (1906); Kane v. New York Elevator R. Co., 125 N.Y. 164, 26 N.E. 278 (1891); Farrel v. Rose, 253 N.Y. 73, 170 N.E. 498 (1930).

[9]State ex rel. Suksdorf v. Superior Court, 169 Wash. 195, 13 P. 2d 460 (1932); 25 Am. Jur., Highways, § 253.

[10]City of San Antonio v. Pidgeonhole Parking of Texas, 311 S.W. 2d 218 (Tex. 1958). The Appellant city had denied all access to appellee's ultra-modern garage from Houston Street, one of the city's busiest streets. The only means of ingress and egress was from a minor street. This was ruled a valid exercise of the police power.

[11]Police power has been defined as the power which the state inherently has to restrict property rights without paying compensation by regulations tending to promote the public health, safety, morals, and general welfare. 11 McQuillin, Municipal Corporations 263 (3d. ed., Smith 1950).

[12]Mugler v. Kansas, 123 U.S. 623 (1887), declares eminent domain to be the power to appropriate private property for a public use upon payment of just compensation.

[13]Woolf v. Fuller, 87 N.H. 64, 74 Atl. 193 (1934).

[14]Miss. Const., art. 3, § 17.

[15]3 Stan. L. Rev. citing American Road Builders' Association, Highway Economics and Design Principles (Bull. No. 67, 1940).

[16]State, By and Through State Highway Commission v. Burk, 200 Or. 211, 265 P.2d 783 (1954).

[17]Alexander Co. v. City of Owatonna, 24 N.W. 2d 244 (Minn. 1946). The court held that a complete denial of vehicular access was a valid exercise of police power on the theory that since appellant could go into another type business that did not require vehicular access, this was not an unreasonable loss. Such a decision would seem to render the right of access practically valueless.

construction will be burdened with unreasonable costs, thus gravely depleting public funds.

The *Spencer* case is the first in which the Mississippi Supreme Court has had an opportunity to rule on the precise question of where the police power ends and eminent domain begins. Though the case seemingly follows landmark decisions in other jurisdictions which liberally construe prohibition in an effort to protect the private interest of the abutting owner,[18] the case actually turned on the unique fact that the creek divided the property into "two separate economic units."[19] In two very recent subsequent decisions,[20] Mississippi has followed the more progressive view that recognizes the duty of the State to regulate access without the payment of compensation under the police power.[21] Rather than insisting that every restriction is "damage" to the property owner within the meaning of eminent domain, our Court appears to construe what would have been prohibition in the days of limited travel as regulation in the light of today's economic and safety realities. Convenience, economy, and public safety, all demand that the State be given a wider discretion in the regulation of access rights.

Dewitt T. Hicks, Jr.

TITLES — RIGHT OF MORTGAGEE TO PURCHASE AND ASSERT TAX TITLE AGAINST MORTGAGOR

In an action to quiet title to a home and lot, it appeared that plaintiff's father purchased the mortgage on the land in question, at which time the mortgage was in default and the taxes unpaid for a four year period. He attempted to foreclose the mortgage but could not obtain service on the defendant. After removing the tenants, plaintiff went into possession of the property, made improvements, and purchased the tax title. The lower court held that a mortgagee, by purchasing the tax title, could not obtain the property as against the mortgagor; but that the property must be held in constructive trust for the mortgagor. HELD: Affirmed. *Crofts v. Johnson,* 6 Utah 2d 350, 313 P.2d 808 (1957).

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[18]Analone v. Metropolitan District Commission, 153 N.E. 325 (Mass. 1926); Gulf Refining Company v. City of Dallas, 10 S.W. 2d 151 (Tex. 1928); Howell et al. v. Board of Commissioners for City of Quitman, 149 S.E. 779 (Ga. 1929); In re Appropriation of Easement for Highway Purposes, 112 N. E. 2d 411, (Ohio 1952); Newman v. Mayor of City of Newport, 73 R.I. 385, 57 A.2d 411 (1948).

[19]An expert witness for the Highway Commission testified that the cost of constructing a bridge over the creek to enable the owner to go from the property south of Town Creek to the northern portion (where appellee's only means of access is permitted) was approximately $28,000.

[20]Muse v. Mississippi State Highway Commission, 103 So.2d 839 (Miss. 1958); Harreld v. Mississippi State Highway Commission, 103 So. 2d 852 (Miss. 1958). Chief Justice McGehee in the Harreld case stated: "It has always been true in this country and in other countries that the citizen has been proud of his rights, and has been alert to protect them, but sometimes the time comes when the citizen must exercise the even higher right of giving up what he conceives to be his right in the interest of the public welfare."

[21]For strong decisions following this view see Farmers-Kissinger Market House Co., Inc. v. City of Reading, 2 A.2d 842 (Pa. 1938); City of San Antonio v. Pidgeonhole Parking of Texas, note 10 supra; Wood v. City of Richmond, 148 Va. 400, 138 S.E. 560 (1927); Alexander Co. v. City of Owatonna, note 17 supra.

In jurisdictions where this question has arisen, a majority of courts have adhered to the rule that the mortgagee cannot purchase the mortgaged land at a tax sale while the relationship of mortgagor and mortgagee exists, and hold title as against others having an interest in the property.[1] This rule has been applied in many cases without regard to whether the mortgagee was in possession or merely had a lien on the property.[2] When the mortgagee is in possession, receiving the rents and profits, the courts are almost unanimous in denying the right of the mortgagee to purchase the tax title.[3] The true reason for this result is that the mortgagee in possession is under a duty to pay the taxes, and to permit him or any other person receiving the rents and profits to obtain title through his failure to perform this duty, would be to allow him to take advantage of his own wrong.[4] However, many courts base their decision on the mortgagor-mortgagee relationship alone.[5] The greater conflict of authority arises when the mortgagee has only a lien on the property, although most courts apply the same rule.[6] In Mississippi, as in many other states, the mortgagee has the right to pay the taxes and obtain an additional lien on the property[7] or to redeem the land in part after it has been sold for taxes.[8] Perhaps this is a primary reason the mortgagee is not given the additional rights of purchase at the tax sale as a stranger to the title.[9] The proponents of this rule all realize that it is based on the idea that the mortgagee owes a duty to pay the taxes. Since no express duty is evident, many and varied

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[1]Stinson v. Conn. Mutual Life Ins. Co., 174 Ill. 125, 51 N.E. 193 (1898); Elben v. Major, 147 Ky. 44, 143 S.W. 748 (1912); Koch v. Kiron State Bank, 203 Iowa 206, 297 N.W. 450 (1941).

[2]See note 1 supra.

[3]Allen v. Dayton Hotel Co., 95 Tenn. 480, 32 S.W. 962 (1895); Dusenbery v. Bidwell, 86 Kan. 666, 121 P. 1098 (1912); Findley v. Tyler, 300 S.W. 2d 598 (Ark. 1957).

[4]Pool v. Ellis, 64 Miss. 555, 1 So. 725 (1896), in which it was held that if the purchaser of land at an administrator's sale pays the purchase price and goes into possession of the land before a confirmation of the sale, he cannot acquire a tax title thereto, since, if by reason of the appropriation of a part of the purchase money to the payment of the debts of the intestate he should be regarded as having an equitable charge upon the land, he would occupy the position of a mortgagee in possession receiving the rents and profits of the estate. Therefore, a purchase by him at the tax sale should be treated only as a payment of the common charge made for the benefit of the whole estate. If on the other hand he should be regarded as a mere intruder, liable to the owners for the rents of the lands, these rents, which in the instant case exceeded the amount paid for taxes, ". . . would operate *eo instanti* as payment of the amount expended in the purchase and as a redemption of the property."

[5]See note 3 supra.

[6]Farmer v. Ward, 75 N.J. Eq. 33, 71 Atl. 401 (1908); Des Moines Savings Bank and Trust Co. v. Eisenmenger, 183 Minn. 46, 235 N.W. 390 (1931); Pearce v. Montague, 209 N. C. 42, 182 S.E. 707 (1935); Person v. Miller Levee District, 202 Ark. 173, 150 S.W. 2d 950 (1941); David Oil Co. v. Fogle, 354 Pa. 150, 47 A.2d 209 (1946).

[7]Miss. Code Ann. §§ 9963-9965 (1942).

[8]Miss. Code Ann. §§ 9950-9952 (1942).

[9]In Perkins v. White, 208 Miss. 157, 43 So.2d 897 (1950), the court set forth the general rule that the mortgagee could not acquire property at a tax sale as long as the relationship of mortgagor and mortgagee existed, at least where the mortgagee has merely a lien on the mortgaged property, and where he can, if he chooses, pay the taxes upon default of the mortgagor and add the amount so paid to his claim. The court then disposed of this question by finding that the relationship of mortgagor-mortgagee no longer existed and allowed the former mortgagee to hold the title. See also McLaughlin v. Green, 48 Miss. 175 (1873).

analogies are used to find such a duty. Some courts merely state that the mortgagee is under this duty and search no further.[10] Others base their decision on public policy, saying that it is to the interest of the state that taxes be promptly paid; and if the mortgagor does not do so, the obligation falls upon the mortgagee as a matter of public interest.[11] It has been said that it is well established that a mortgagee may not assert a tax title against the mortgagor since a trust relation arises in which the mortgagee becomes a trustee and is not only debarred from acquiring title himself but is under an obligation to pay the taxes as a means of protecting the trust property against a hostile title.[12] Of course this would be true, a fortiori, where the mortgagee was the agent of the mortgagor for collection of the rents and profits.[13] These courts stress the community of interest of the parties in preserving the estate by payment of taxes, drawing the conclusion that it would be inequitable conduct for one to acquire and assert a tax title against the others, or that presumably payment was made for the common protection.[14] Sometimes the analogy of tenants in common is announced as the reason compelling the mortgagee to pay the taxes.[15] Where the relationship of mortgagor-mortgagee came into existence after the purchase of the tax title,[16] and, also where the relationship no longer existed at that time,[17] the mortgagee may assert his title even in jurisdictions applying the majority rule. However, if the mortgagee purchases only with the purpose to protect the property, his intention to buy for the common good will preclude his assertion of title against the mortgagor.[18]

While most jurisdictions follow the rule already announced, there is a strong minority which hold that the mere existence of the relationship of mortgagor-mortgagee does not in itself preclude the latter from obtaining and asserting a paramount tax title against the mortgagor.[19] Where the mortgagee is out of possession and under no express contractual duty to pay the taxes, these courts refuse to find a fiduciary duty growing from a relationship which is actually adversary. They

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[10]Stinson v. Conn. Mutual Life Ins. Co., 174 Ill. 125, 51 N.E. 193 (1898); Marwalt Realty Co. v. Green, 224 Wis. 1, 271 N.W. 648 (1937).

[11]Conn. Mutual Life Ins. Co. v. Bulte, 45 Mich. 113, 7 N.W. 707 (1881). "It certainly cannot be said that the second mortgagee owes any duty to the first mortgagee to protect his lien against tax sale. Neither, on the other hand, does the first mortgagee owe any such duty to the second mortgagee, or to the mortgagor. To the state each one of the three may be said to owe the duty to pay the taxes; and the state will sell the interest of all if none of the three shall pay." See also Des Moines Savings Bank and Trust Co. v. Eisenmenger, 183 Minn. 46, 235 N.W. 390 (1931); Ragor v. Lomax, 22 Ill. App. 628 (1887); 46 Yale L. J. 334 (1936).

[12]Finalyson v. Peterson, 11 N.D. 45, 89 N.W. 855 (1902); Ten Eyck v. Craig, 62 N.Y. 406 (1875); Pearce v. Montague, 209 N.C. 42, 182 S.E. 707 (1935).

[13]Wall v. Hammer, 182 La. 1049, 162 So. 769 (1935).

[14]Fair v. Brown, 40 Iowa 209 (1875); Woodbury v. Swan, 59 N.H. 22 (1879); Hall v. Westcott, 15 R.I. 373, 5 Atl. 629 (1886).

[15]Conn. Mutual Life Ins. Co. v. Bulte, 45 Mich. 113, 7 N.W. 707 (1881).

[16]Eaton v. McCarty, 34 Idaho 747, 202 P. 603 (1921); Middletown Savings Bank v. Bacharach, 46 Conn. 513 (1879).

[17]Ensley v. Coolbaugh, 160 Mich. 299, 125 N.W. 279 (1910); Perkins v. White, 208 Miss. 157, 43 So.2d 897 (1950).

[18]Martin v. Swofford, 59 Miss. 328 (1881).

[19]Moore v. Boagni, 111 La. 490, 35 So. 716 (1903); McLaughlin v. Acom, 58 Kan. 514, 50 P. 441 (1897); Cornell v. Woodruff, 77 N.Y. 203 (1879); Jones v. Black, 18 Okla. 344, 88 P. 1052 (1907).

also reject the contention that the state imposes such an obligation and allow the mortgagee to purchase as a stranger to the title subject only to the mortgagor's right to redeem.[20] Certainly the text-writers adopt the minority view and assert that there is no valid basis on which to rest the mortgagee's duty to pay taxes. One author points out that the only reasonable foundation for the majority result is that it is against public policy to allow the mortgagee, by leaving the taxes unpaid, to acquire a tax title and to save the costs of foreclosure.[21] Even this proposition has been attacked by the writers of *The American Law of Real Property*.[22]

One may conclude that the reason which is the basis for denying a mortgagee the right to purchase the tax title is a duty arising from some fiduciary relationship found to exist between the mortgagor and mortgagee. Certainly this "fiduciary" duty is not contractual. Therefore, it appears that the courts find a fiduciary relationship in a situation where the interests of the parties are actually adverse. Other courts, realizing that the mortgagee is under no obligation to the mortgagor to pay the taxes, announces that the state imposes such a duty. However, there are few, if any, states which have statutes imposing this obligation, so it must arise judicially. As to the mortgagee in possession, a duty to pay the taxes can easily be based upon the fact that any person in possession of real property, receiving the rents and profits, is under a duty to pay the taxes without regard to the fact that he is also a mortgagee. But, this is not so with respect to the mortgagee out of possession. Here, no such duty exists and the courts seem to be in error in finding that it does exist. If a duty is to be imposed, it should not be explained as a consequence of the mortgagor-mortgagee relationship. In the absence of a contractual obligation, the mortgagee should be allowed to elect his remedy and, if he so desires, to purchase the tax title as a stranger to the property. Such election would extinguish the mortgage debt, thus avoiding the problem of the mortgagee occupying inconsistent positions.

Jack W. Brand

TORTS — RES IPSA LOQUITUR — APPLICABILITY AGAINST MULTIPLE DEFENDANTS

Plaintiff alleged in the complaint that he was operating his automobile upon a public highway; that preceding plaintiff was the automobile operated by defendant, Key; that defendant, Key, negligently allowed luggage to fall upon the highway from a luggage carrier attached to the top of his car; that plaintiff thereby was compelled to stop and immediately thereafter was struck from the rear by defendant, Hosang's, automobile. HELD: Doctrine of res ipsa loquitur was applicable against defendant, Key, even though specific acts of negligence were pleaded

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20Waterson v. Devoe, 18 Kan. 223 (1877).
215 Tiffany, Real Property, § 1425 (3rd Ed. 1939).
224 American Law of Real Property, § 16.106J.

against defendant, Hosang. *McCarty v. Hosang, et al.*, 154 *F. Supp.* 852 (S.D. Mo. 1957).

In order to invoke the doctrine of res ipsa loquitur,[1] three prerequisities must be satisfied.[2] Consistent with the requisities, and particularly with the one stating that the defendant must have exclusive control over the instrumentality causing the injury, courts have recognized that there are several types of cases in which the doctrine may be properly applied against multiple defendants. It may be applied where vicarious liability exists,[3] or where there are joint tortfeasors,[4] or joint control[5] over the instrumentality causing the injury. But if the plaintiff cannot establish that his case is one of the particular types, then the general rule is that the plaintiff cannot properly apply the doctrine.[6] However, a few recent cases have established an exception to the conventional requirement of exclusive control by upholding the applicability of the doctrine against doctors, nurses, and an anesthetist for injuries received by a patient.[7] That the departure was not confined to the existence of some special duty is illustrated by another case[8] in

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[1]Some leading articles concerning the nature and effect of the doctrine of res ipsa loquitur are: aCrpenter, The Doctrine of Res Ipsa Loquitur, 1 U. Chi. L. Rev. 519 (1934); Malone, Res Ipsa Loquitur and Proof of Inference, 4 La. L. Rev. 70 (1941); Heckel and Harper, Effect of the Doctrine of Res Ipsa Loquitur, 22 Ill. L. Rev. 725 (1928); Prosser, The Procedural Effect of Res Ipsa Loquitur, 20 Minn. L. Rev. 241 (1936); Prosser, Res Ipsa Loquitur in California, 37 Cal. L. Rev. 183 (1949).

[2]The prerequisites usually stated as necessary for the application of the doctrine are: (a) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (b) the accident must be caused by an agency or instrumentality within the exclusive control of the defendant; (c) the accident must not have been due to any voluntary action or contribution on the part of the plaintiff. Wigmore, Evidence, § 2509 (3d ed. 1940).

[3]Knell v. Morris, 39 Cal. 2d 450, 247 P.2d 352 (1952); Schroeder v. City & County Saving Bank of Albany, 293 N. Y. 370, 57 N.E.2d 57 (1944); Weddle v. Loges, 52 Cal. App. 2d 115, 125 P.2d 914 (1942) (principal and agent); Hinds v. Wheadon, 19 Cal. 2d 458, 121 P.2d 724 (1942) (master and servant).

[4]Price v. McDonald, 7 Cal. App. 2d 77, 45 P.2d 425 (1935); Pierce v. Schroeder, 171 Kan. 259, 232 P.2d 460 (1951).

[5]Waterbury v. Riss & Co., 169 Kan. 271, 219 P.2d 673 (1950); Kelly v. Laclede Estate & Invest. Co., 348 Mo. 407, 155 S.W.2d 90, 138 A.L.R. 1065 (1941); Heny v. Carlson, 6 N.J. 82, 77 A.2d 245, 22 A.L.R. 1160 (1950).

[6] Actiesselskabet Ingrid v. Central R.R. of N.J., 216 Fed. 72 (2d Cir. 1914); Kirchmer v. Kulman, 335 Ill. App. 339, 79 N.E.2d 628 (1948); Wolf v. American Tract Society, 164 N.Y. 30, 58 N.E. 31 (1900).

[7]Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258 (1944). Here the plaintiff developed paralysis and atrophy of the muscles around the shoulders after having undergone an appendectomy in a hospital. He sued the doctor who had arranged his admission into the hospital, the surgeon performing the operation, the owner of the hospital, the anesthetist, and two nurses. The plaintiff was unable to show which particular defendant had caused the injury. In reversing the trial court's judgment of nonsuit in favor of the defendants, the California Supreme Court said:

> "That where a plaintiff received unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct."

At the second trial judgment was rendered in favor of plaintiff against all defendants. Ybarra v. Spangard, 93 Cal. App. 2d 43, 208 P.2d 445 (1945). Accord: Meyer v. St. Paul-Mercury Idem. Co., 61 So.2d 901 (La. App. 1952).

[8]Knell v. Morris, 39 Cal. 2d 450, 247 P.2d 352 (1952); in accord Coca-Cola Bottling Co. v. Lowe et al., 275 S.W.2d 47 (Ky. App. 1955) where plaintiff brought action against the bottling company and the owners of a grocery store for injuries

which the doctrine was held applicable against the owner of a water-heater, which leaked and flooded plaintiff's premises, and a plumber who had previously made repairs to the heater.

The instant case presents no difficulty concerning the question of departing from the exclusive control requirement. Though the court stated that the propriety of the application of the doctrine was premature,[9] there were two alleged injuring instrumentalities:[10] to one the plaintiff predicated the doctrine of res ipsa loquitur and to the other specific acts of negligence. In this particular multiple defendant situation, it appears that a plaintiff may prove specific negligence of one defendant without losing, as against the co-defendant, the right to rely on res ipsa loquitur.[11] However, the applicability of the doctrine to a plurality of defendants remains a disputed question in cases where the plaintiff can show no individual defendant who possesses exclusive control over the injuring instrumentality.[12] When a plaintiff has been injured by an unusual accident to which he has in no way contributed, and the accident is of a kind that would not have happened had proper care been exercised over the instrumentality causing the injury, is it desirable to afford the plaintiff no remedy predicated upon the doctrine of res ipsa loquitur merely because there was no joint or vicarious control over the agency which caused his injury? It is submitted that this is undesirable. It should be remembered, as was pointed out in a recent Iowa case,[13] that the doctrine of res ipsa loquitur is a simple, understandable rule of circumstantial evidence with a sound background of common sense and human experience. The difficulty comes only when it is transformed into a rigid legal formula, which precludes its application in the many cases where it is most important that it should be applied.[14]

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sustained when a Coca-Cola advertising sign, hanging on an outside wall of the store fell and struck her on the head and shoulders. The Court held that under the evidence as to ownership, management, control and maintenance of the sign, it would have been proper to have directed a verdict in favor of the plaintiff against both defendants, under the doctrine of res ipsa loquitur.

[9]McCarty v. Hosang et al., 154 F. Supp. at 852 (S.D. Mo. 1957).

[10]McCarty v. Hosang, et al., supra note 9 at 854.

[11]Clair v. McAlister, 216 Cal. 95, 13 P.2d 924 (1932); Dieterle v. Yellow Cab Co., 34 Cal. App. 2d 97, 93 P.2d 171 (1939); Whylie v. Craig Hall, Inc., 272 App. Div 603, 74 N.Y.S.2d 128 (1947).

[12]See note 6 supra.

[13]Frost v. Des Moines Still College of Osteopathy and Surgery, et al., 79 N.W. 2d 306 (Iowa 1956).

[14]Courts and text writers are not in agreement concerning the effects of the doctrine of res ipsa loquitur. Some say a permissable inference has arisen while others say a presumption has arisen. Courts holding that a presumption has arisen, say that by virtue of the presumption the defendant must come forward with some evidence sufficient to rebut the presumption, and in the absence of such evidence the plaintiff is entitled to a directed verdict as a matter of law. Thus under the presumption view, the defendant must go forward with the evidence in order to escape the operation of the doctrine. It is submitted that under the presumption view courts are supplied with the legal rationale to apply the doctrine against multiple defendants. Then in a situation similar to the facts in the Ybarra case, supra note 7, res ipsa loquitur would require each defendant, if he desired to escape liability, to come forward with an explanation tending to show his absence of control over the injuring instrumentality, since he is in a much better position to explain his behavior than the unconscious plaintiff.

TORTS — UNAVOIDABLE ACCIDENT — NOT COMPENSATORY

Dick Jezek, deceased, climbed near the top of a utility pole for the purpose of affixing a banner advertising a rodeo. While sitting astride the pole, he contacted an electric wire and received an electrical shock which resulted in his death. The appellant, Texas Power and Light Company, had a contract with the Telephone Company to attach its wire to the telephone pole. The National Electric Code requires a 40 inch clearance between the telephone cable and the lowest electric wire, where both type wires are attached to the same post. The undisputed evidence showed that the appellant's electric wire was only 36 inches above the telephone cable. The jury was instructed that if they found this to be an unavoidable accident there could be no liability. The jury found that the death was the result of an unavoidable accident but allowed an $8,000.00 recovery. Appellant filed its motion for judgment *non obstante veredicto,* which was overruled, and the Court granted appellee's motion to disregard the jury's finding that it was an unavoidable accident. HELD: Affirmed. Failing to maintain the electric wire with the proper clearance was negligence per se and voids the inference of an unavoidable accident. *Texas Power & Light Company v. Jezek,* 302 S.W. 196 (Tex. 1957).

An unavoidable accident is an unintended occurrence which could not have been prevented by the exercise of reasonable care.[1] It is an event in which none of the parties are negligent and no negligence is involved.[2] In the instant case, it was negligence per se to maintain the electric wires 36 inches above the telephone cables when the National Electric Code required a minimum clearance of 40 inches. The general rule is that negligence per se is not actionable unless it is the proximate cause of the injury.[3] An accident is regarded as unavoidable when it is so unlikely to happen that the risk would commonly be disregarded, such as an unpredicted flood,[4] frost,[5] an automobile thrown unexpectedly against a pillar on the corner,[6] a child picking up a plank with a nail in it and dropping it on his foot,[7] or a pedestrian slipping on a

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[1]Prosser, Torts 117 (2d ed. 1955).

[2]Leeper v. Nelson, 139 Cal. App. 2d 65, 293 P. 111 (1956); Einfeldt v. Watkins, 6 Ill. App. 2d 205, 126 N.E. 2d 864 (1955); Frel v. Brownlee, 56 N. M. 677, 248 P. 671 (1952); Marsh v. Chesney, 11 Ill. App. 2d 577, 138 N. E. 2d 97 (1956); Parker v. Womack, 37 Cal. 2d 116, 230 P.2d 823 (1951); Keating v. Zumwalt, 91 Cal. App. 2d 845, 206 P.2d 10 (1949); Hartman v. Dunn, 186 Okl. 9, 95 P.2d 897 (1939); Lynch v. Defino, 114 Cal. App. 2d 128, 249 P.2d 615 (1952).

[3]Nisbet v. Van Tuyl, 224 F.2d 66 (1955); Valley Transport System v. Reinartz, 67 Ariz. 380, 197 P.2d 269 (1948); Cruce v. Taylor, 89 Ga. App. 611, 80 S.E.2d 704 (1954); Chapman v. Associated Transport, 218 S. C. 554, 63 S.E.2d 465 (1951); Claypool v. Mohawk Motor, 155 Ohio St. 8, 97 N. E. 2d 32 (1951); Satterlee v. Orange Glenn School District, 29 Cal. 2d 581, 177 P.2d 279 (1947).

[4]McCaulye v. Logan, 152 Pa. 202. 25 Atl. 499 (1893); Power v. Village of Hibbing, 182 Minn. 66, 233 N.W. 597 (1930); Louisville & N. R. Co. v. Finlay, 237 Ala. 116, 185 So. 904 (1939); Pleasure Beach Park Co. v. Bridgeport Dredge and Dock Co., 116 Conn. 496, 165 Atl. 691 (1933).

[5]Blyth v. Birmingham Waterworks Co., 11 Exch. 781 (1856); Sutphen v. Hedden, 67 N. J. L. 324, 51 Atl. 721 (1902); Missouri Pac. R. Co. v. Columbia, 65 Kan. 390, 69 P. 338 (1902).

[6]Leachman v. City of Louisville, 270 Ky. 260, 109 S.W.2d 614 (1937); Martin v. Hodson, 93 N. H. 66, 35 A.2d 402 (1943) (car swerving on wrong side of road).

[7]Spiering v. City of Hutchinson, 150 Minn. 305, 185 N. W. 375 (1921); Chipokas v. Peterson, 219 Iowa 1072, 260 N.W. 37 (1935) (child darting out in path of

small bit of gravel in the highway.[8] In general, there is no liability for an unavoidable accident.[9] Upon the same basis, the driver of an automobile, who is suddenly seized with a fainting fit, has been held not liable for the damage done by his car.[10] There may be negligence in driving at all when the driver knows he is subject to certain attacks, such as epileptic fits,[11] or falling asleep.[12] The uniform rule is that, in the absence of some wrongful intent or negligence, there is no liability.[13] The "unlawfulness" of the act must consist of the harm protected by the statute or there is no liability, because the result could not have been avoided by reasonable care in the act itself.[14]

It appears then that the principal case is but another in a long line of decisions attempting to settle, in future cases, whether the event, under all the circumstances, was an unavoidable accident. There are no fixed and permanent rules which courts are obligated to apply because of the numerous factors that must be considered in ascertaining whether negligence was involved. In *City of Greenville v. Laury*,[15] the Supreme Court of Mississippi said: "Actionable negligence is not determinable alone from the doing of an act resulting in injury to another. Such an act . . . creates liability only when the circumstances attending it are such that the actor should have inferred that the doing of the act 'creates an appreciable chance of causing injury to another.'" It is submitted that the determination of what is an unavoidable accident will be made by the courts on the facts of each particular case.

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vehicle); Johnson v. Wichita Valley R. Co., 104 S.W.2d 128 (Tex. Civ. App. 1937) (chip struck out by adz flying into eye); Will v. 1527-31 Wicker Park Ave. Bldg. Corp., 328 Ill. App. 214, 115 A. L. R. 1495 (1946) (piece of steel from hammer flying 15 feet); Hochberg v. Green, 162 N.Y.S. 983 (1917) (horse on street shaking head and knocking boy down).

[8]Missouri Pac. R. Co. v. Richardson, 185 Ark. 472, 47 S.W.2d 794 (1932); Clergon v. Thompson, 62 Kan. 727, 64 P.2d 605 (1901) (deflection of bullet); Gagon v. Divittorio, 310 Mass. 475, 64 N.E.2d 629 (1941) (cuff on coat sleeve caught on truck); Scurfield v. Federal Laboratories, 335 Pa. 145, 6 A.2d 559 (1939) (accident with tear gas gun); City of Greenville v. Laury, 172 Miss. 118, 159 So. 121 (1935) (crack in sidewalk); Mann v. Pulliam, 344 Mo. 543, 127 S.W.2d 426 (1939) (step).

[9]Steudle v. Rentchler, 64 Ill. 161 (1872).

[10]Cohen v. Petty, 65 F.2d 820 (D.C. Cir. 1933); Wishone v. Yellow Cab Co., 29 Tenn. App. 229, 97 S.W.2d 452 (1936); Armstrong v. Cook, 250 Mich. 180, 229 N.W. 433 (1930); Ford v. Carew & English, 89 Cal. App. 2d 199, 200 P.2d 828 (1948); contra, Leary v. Oates, 84 S.W.2d 486 (Tex. Civ. App. 1935). In Sauers v. Sack, 34 Ga. App. 748, 131 S.E. 98 (1921), an epileptic fit was treated as analogous to insanity and the defendant was held liable.

[11]Eleason v. New York R. Co., 254 Wis. 134, 35 N.W.2d 301 (1948); Goldman v. New York Rys. Co., 185 App. Div. 739, 173 N.Y.S. 737 (1919).

[12]Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925); Baird v. Baird, 223 N. C. 730, 28 S.E.2d 225 (1943); Manser v. Eder, 263 Mich. 107, 248 N. W. 563 (1933); Felton v. Horner, 97 Tenn. 579, 37 S. W. 696 (1896) (aged and infirm person risking jolt of train).

[13]Brown v. Kendall, 6 Cush. 292, 60 Mass. 292 (1850) (the defendant, in trying to stop a dog fight, raised his stick and accidently struck a man behind him).

[14]Bourne v. Williams, 209 Mass. 155, 95 N. E. 404 (1911) (driving automobile without license); Cobb v. Cumberland County Power & Light Co., 117 Me. 455, 104 Atl. 844 (1918) (driving unregistered automobile); Muller v. West Jersey & S. R. Co., 99 N. J. L. 186, 122 Atl. 693 (1923) (automobile driver not licensed may recover); Brown v. Shyne, 242 N. Y. 176, 151 N. E. 197 (1926) (practicing medicine without a license).

[15]172 Miss. 118, 159 So. 121 (1935).

RECENT BOOKS

PURITANS, LAWYERS, AND POLITICS IN EARLY SEVENTEENTH CENTURY ENGLAND.

By John Dykstra Eusden. New Haven: Yale University Press, 1958. $4.50.

Every scholar's work begins with a theory. Without one it is very doubtful if many research projects would even be initiated. The ideal, as often stated, is of course to the contrary. To the formulators of the ideal, a book begins by a worker wandering idly into a library where he turns over materials until he produces something of objective value devoid of bias. Without saying no work ever was produced by this approach, it is most doubtful. The motivation of the scholar is generally a desire to prove in print what he is convinced in his mind's recesses must be so. Unfortunately, for the good of science, the proof adduced is too often molded to conform to the pre-existing theory. Often enough a reader feels the author would have done better to have put his striking idea in a sentence and have dispensed with the lumber of illustrative evidence. A great deal of effort would be spared on both sides if such were done. Yet it would be a pity, since it is in the marshalling of support that an author often first doubts his theory. In the absence of that doubt, there would be little value even for the idea that is initially so striking.

Dr. Eusden is such a doubter. His work began conventionally enough with a theory. His theory? "That influence and counterinfluence between Puritanism and common law could be readily established."[1] Common sense commended it. Everyone knew that many common lawyers had been Puritans, that they had contributed to the cause of Puritanism, that both groups had been of the middle class, that both had opposed much the same elements. Obviously ancient files were replete with scraps of paper that would sustain such a case. Dr. Eusden does not say when in his work doubt first was felt, but gradually his mind changed, and with it his theory. No longer was a simple cause and effect relationship what he sought to prove. In its place he had discovered a much more complex situation: namely, that Puritans and common lawyers had been of the same generation and had lived parallel lives. This, too, is common sense, but a sense partaking less of logic than of free thought association. Puritans and common lawyers had spent their times in quite complex living and not in forming units for ideational influence.

Since Max Weber laid it down as a sociological construct about half a century ago, everyone has known there is a Protestant Ethic.[2] The rise of Protestantism provided the "subjective factor" that produced the form of modern capitalism.[3] The glorification of work, the

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[1] p. vii.

[2] "Protestant asceticism [is] the foundation of modern vocational civilization—a sort of spiritualist' construction of the modern economy." From Max Weber: Essays in Sociology, H. H. Gerth and C. Wright Mills, eds. (1946), pp. 18-19 quoting, Max Weber, letter to Wilhelm Richert.

[3] Ibid. p. 447, n. 20, discussing the critique of Ephraim Fischoff.

assurance of material rewards in this life for those who practice virtue, the rightness of income earned in trade and finance are all associated with this Protestant Ethic.[4] For many years it has not been possible for one writing in the area of religio-economic history to avoid using this highly provocative idea. Like most ideas, however, it is subject to abuse, particularly by those who seek to tidy up its edges. Weber, himself, was careful to point out the artifical nature of his constructs, that their only use was as a means of presenting types for examination in the rounds.[5] As such they were very neat but behind them was the mess from which they were drawn—"the total picture."[6] Like Ernst Troeltsch and Paul Tillich, Dr. Eusden wrestles with the relation of ideas to real things, the connecting of the constructs made neat for study with the formless background from whence they were drawn.[7] Perhaps it was here that he felt his first doubt as to the validity of his neat initial thesis.

One analogy, that may help to clarify the concept of a history of ideas, is the stratified layers with which the prehistorian works. When the bank is cut away, there will be cultures A., B., C., and D. Each may have developed from its predecessor in which case there will be a gradual change in artifacts. The standards of culture A will grow more and more scarce while the standards that identify culture B come to the fore. On the other hand the cultures may not be related. Culture B will then break off in fire and slaughter to be abruptly replaced by culture C on the smoothed over ruins. Or culture B may depart because of drought and culture C not arrive until the sands have blown across its predecessor's remains. But in any case the evidence stays, perhaps complicated by an upheaval of the earth thrusting culture B into culture C's level or an erosion that washes culture D into culture C. There it lies for the sorting. Ideas are much the same. In century after century there may come a gradual development in one area. Or there may be an incursion of ideas from elsewhere. There may come an upheaval thrusting the past forward or a flood of ideas reading their existence into the past. Early seventeenth-century England is such a stratified site and Dr. Eusden has tried to sort out part of it.

First, there is the gradual development of ideas in England itself. The concept of distributive authority is one the author finds particularly English. Medieval in origin, he finds it flourishing today.[8] Puritans and common lawyers alike worked upon it to produce the changes

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[4]R. H. Tawney, Religion and the Rise of Capitalism, (Rev. ed. 1937), pp. 15-16 found the same ideas held by Catholic theologians of the fourteenth and fifteenth centuries, Ibid. p. 259, note 7 quoting Nicholas Oresme, Bishop of Lisieux, Laurentius de Rodolfis, and St. Antonio, archbishop of Florence.

[5]"In order to make this attempt, the author must take the liberty of being 'unhistorical' in the sense that [matters] are presented systematically and essentially in greater unity than has ever been the case in the flux of their actual development . . . If it were done arbitrarily, this simplification would be a historical 'falsification.' This, however, is not the case, at least not intentionally." Gerth and Mills, *op. cit.* p. 294, reprinting Weber, "The Social Psychology of the World Religions: Introduction." (1913).

[6]Ibid.

[7]pp. 140-141, discussing Tillich's concept of "belief-ful realism." The reality to which ideas relate can also be other ideas.

[8]pp. 155-160.

that marked the idea's passage through the centuries. Foreign ideas, too, made their appearance. The Marian exiles brought back John Calvin's religion[9] and William Prynne put forward a vigorous Erastianism in the Long Parliament.[10] Other disciplines, as well as other nations, made their invasions and science supplied ideas for the Puritan's purposes.[11] The past was brought forward, too, for the Puritans saw in the Stoics "the clear emphasis on God's rule and providence."[12] All of it was further complicated by later writers who threw back into the period ideas not then prevalent. The best example of that, perhaps, is the interpretation put upon Dr. Bonham's case. S. E. Thorne showed twenty years ago that all the court meant to say was that a party ought not to judge his own case. It was not a precedent for judicial review.[13] But, so holding, it was important in the nineteenth century and this is the sort of erosion that often occurs upon a century's ideas. Dr. Eusden is careful to identify all of the strata and assign origins for each.

Before it is possible to consider Puritans and common lawyers in early seventeenth-century England, it is necessary to consider what lay about and behind them. For instance, why discuss common lawyers or limit the discussion to them? There were others. There were the civilians, who practiced in the Court of Requests and in the manorial councils. University trained, favored by the crown and nobility, they had behind them the weight of the Roman law and the prejudice of the Renaissance. Then there were the canon lawyers who had the business of the ecclesiastical courts, and the proctors who handled the business of estates. There were the equity pleaders who practiced before the Court of Chancery and who were engaged in making up the rules of what constituted *ex aequo et bono*. What it was to be had not been determined prior to the late seventeenth century. Practice was as exciting to them as to any serjeant or king's counsel. There were those, too, who handled the business of the merchants before the lord admiral's court, the courts of the burgesses and the courts of the merchants themselves. When the seventeenth century began there was no reason to believe the practitioners in three courts — King's Bench, Common Pleas, and Exchequer — would put to rout the opposition. The evidence was all to the contrary. The Holy Roman Empire was in the process of receiving Roman law, while the Writers to the Signet in Scotland had been converted. But the common law had Coke; and he was to provide what the other systems lacked: a single-minded advocate. That alone was not the sole reason. Dr. Eusden makes that evident; and it was these other reasons which supplied the alliance between Puritans and common lawyers.

When Henry VIII rejected the Pope, Protestant theologians found

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[9]p. 26, although the idea of "an all-embracing divine sovereignty" was also put forward by John Wyclif.

[10]p. 33. Most Puritans, however, rejected the idea of secular control of the church.

[11]p. 37.

[12]p. 27, citing Thomas Gataker's, "Introduction to the Maxim's of Marcus Aurelius."

[13]pp. 135-136, citing S. E. Thorne, "Dr. Bonham's Case," 54 Law Quarterly Review, No. 216 (Oct. 1938).

a divine decree ordering final and complete obedience to the King.[14] By 1603, when James came to Henry's place, this view no longer interested Puritans.[15] But it interested others. Lord Verulam, in currying royal favor, pushed for the expansion of the chancery court. The civilians whose practice lay in the prerogative courts, also worked for a sole central authority. The canonists, whose courts were threatened in the execution of their judgments by the forces of the common law, appealed to the King. It would be puerile to emphasize personal advantage here as the decisive factor, although it would be equal folly to oust it from consideration. The discovery of political science by Jean Bodin[16] had stressed the role of a strong central authority to distribute power throughout the community. The logical minds of the Renaissance from Dante through Machiavelli to Erasmus adhered to the view of power at the center. The civilians, who saw themselves as that power's administrators, cannot be blamed for its advocacy. But the Puritans regarded it as a threat and rejected the theories of Bodin and his English followers.[17] The common law lawyers whose system was so unadaptable to a rationally organized state were also hostile, while the merchants desired only so much authority as would protect them in their enterprise.[18] An alliance might, therefore, not be unnatural.

But it was not a matter of a coalition of coherent political units. The merchants had scarcely emerged from dependence upon the crown for their role in political affairs and the common law lawyers found it difficult to see where the interests of their profession lay. As for the Puritans, they were an amorphous group within the Anglican church.[19] Those who study the role of religious blocs so long view them as economic influences and social causes that they forget a religious bloc is created first from motives other than economic, social or political.[20] Dr. Eusden carefully avoids such an error in relation to the Puritans.[21] The Puritans wrestled first with problems of personal salvation and then with other matters when the content of their beliefs produced conflicts. They were hostile to general theorizations, for they clasped the Bible as their answer-book to all problems. As Stanislas Kot has pointed out, it is strange that those who most strictly invoked scripture were to exalt most the role of human reason[22] in priority to human emotion.[23] Such was the case, however, and here, too, they may have

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[14]p. 114, quoting William Tyndale, "The Obedience of a Christian Man" (1528).

[15]p. 73. They did not reject the supremacy of the crown in spiritual matters, but they attached qualifications to the king's power as governor of the church.

[16]p. 176. Bodin, of course, would have limited power at the center and this, perhaps, is his contribution.

[17]See note 8 supra.

[18]pp. 104-110 for a discussion of Bate's Case.

[19]pp. 15-16.

[20]Marxists, of course, deny this. Engels viewed the Reformation as a "bourgeois-plebian movement under a religious cloak." Frederick Engels, letter to Karl Kautsky, May 21, 1895, in D. Riazonov, Introduction (1925) to Engels' "The Peasant War in Germany," (Am. ed. 1926), p. 10.

[21]pp. 19-40, his discussion of "The Essential Calvinist Core."

[22]Stanislas Kot, "Socimanism in Poland," (Am. ed., Earl Morse Wilbur, 1957) p. xxiv.

[23]See Andre' Gide, Introduction (1947) to James Hogg, "Confessions of a Justified Sinner" (1924), where he remarks on what he calls "this monstrous fruit of the Tree of Knowledge," p. xi, in speaking of the Antinomians.

been a cause for sympathy between the *ration recta atque integra* of the theologians and the "artificial reason" of Coke.[24] It was as the King found them to be "pestes" and forbade them their mission of preaching that the Puritans turned toward other allies in what became their struggle.

In speaking of Puritans, Dr. Eusden confines himself to a few divines and laymen who wrote extensively on theology. Naturally, this does not embrace the Puritan movement. So long as Puritanism remained within the Anglican church (and the Puritans detested the separating Congregationalists),[25] they had many allies.[26] To the sad fate of categorization, the confusion of labels in the period contributes a good deal. Dr. Eusden is careful to differentiate the various sorts of views held by persons called Puritan, but he holds them in low regard, as having little importance in the early seventeenth-century. The impact of Calvinist theology had a greater meaning than any question of temporal organization. Not until the Puritans had arrived at certain conclusions relating to salvation did they devote much energy to other matters. Discussions of free spech, religious liberty, Parliamentary supremacy, and related matters, considered by subsequent generations to originate with Puritan thinking, were all the result of the conflicts following the convening of the Long Parliament. In the demands that preceded that period, Dr. Eusden found little to forecast what the future would bring.[27] Despising broad theoretical declarations, accustomed to moving from scriptural verse to scriptural verse in the assembling of arguments, the Puritans waited until circumstances presented them with experiences from which a particular solution might be wrung. Only later, in retrospect, was it seen that a theory of liberty had been set forth, act by act.[28]

But, why should the particular acts have taken this form? Partly, it may have been due to the something less than victory won by the Puritans. In the flush of conquest, there were not lacking those who declared for an absolutist state.[29] Even then, there had been those who opposed such a constitution for the state — groups and men as diverse as the Levellers[30] and John Milton. But after 1660 there was a necessity to reach a *modus vivendi* with the Anglican majority and a necessity for the latter also to come to terms.[31] The fact that they were not too far apart at any time during the seventeenth-century greatly facilitated this compromise, even though it had to be reached over the body of the

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[24]pp. 133-135.

[25]p. 15. "With Ramist logic and strained casuistry, the Independents called for an established church and yet insisted on the autonomy of the local parish," p.14.

[26]Dr. Eusden finds much sympathy between Richard Hooker, the Anglican spokesman, and the Puritans, pp. 16-17.

[27]p. 154.

[28]Dr. Eusden sees John Locke in the role of this post-natal summarizer, p. 177, n. 11.

[29]p. 148 citing John Pym and Oliver Cromwell.

[30]p.55. Despite the economic and social radicalism of this group, it put most stress upon individual freedom.

[31]p. 161. "When James II refused to acknowledge the shift of authority from Crown to Commons, it was a relatively simple matter in 1688 to impress parliamentary supremacy upon that grandson of the first Stuart."

House of Stuart.[32] Dr. Eusden finds at this point that a cultural phenomenon in the realm of ideas assisted along the course of the adjustment. The phenomenon was the theory of independent institutions — "a decentralized, distributive, nonmonistic concept of sovereignty."[33] In the middle ages society was highly pluralistic. There were the various institutions of the church, of royalty, of feudalism, of the universities, of customary law; and not one of these formed in itself a rationalized unit. The king or emperor might stand at the head of feudal society, the pope at the head of the church; but their day to day powers were very tenuous. The monasteries, the mendicant friars, the diocesan clergy were all autonomous institutions owing the sketchiest submission to formal superiors. An archdeacon who secured the jurisdiction over a testate's estate, could defend that jurisdiction successfully against his bishop, his archbishop, or the Papal Curia itself. It requires no elaboration to state the lowly degree of control the king had over burgage or manorial courts. Society was built out of separate pieces and no one piece was absolute or even a source of lawful change. This was the inheritance of all western Europe, but only in England was it successfully utilized on any extensive scale to form a state exercising power short of the absolute.[34] The roles of the Puritans and the common lawyers were important in achieving this end.

Much fun has been had because Coke was an antiquary, because he was a medievalist,[35] because he was taken in by the thirteenth-century jest perpetrated by Andrew Horn.[36] But without these medieval qualities he could never have formulated a defensible organization of the common law nor resisted the agitators for an absolutist society. With all due regard to the universal genius of Francis Bacon and with due regard for the parochial qualities of Edward Coke, it is most fortunate the latter put the former to political rout. Even the primitive view of law held by Coke — that courts do not make the law but only discover it[37] — was a useful means of dispensing power at the source and disarming the otherwise most powerful at first instance. Coke might have had trouble agreeing with the justification for his work provided by Harold J. Laski or F. W. Maitland,[38] but he had no doubt as to its inherent rightness. Nor did the Puritans, who found this agreeable both to their federal theory of theology[39] and to the objective circumstances in which

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32Ibid. At no time were the proponents of divine right absolutist monarchy many in number. The support for the Stuarts came from other sources and, as the fate of the Stuarts indicated, had other goals than absolute power for the royal house.

33p. 175.

34It is an exaggeration to say this; but certainly the theory of the civil law, completely triumphant on the continent, is based upon a monist view of the state, if not of society.

35p. 156.

36p. 117, n. 6.

37p. 159. This is the distinction between the *jus dicere* and the *jus dare*.

38p.175, citing the "out-and-out pluralism" of Laski and the "'group personality' of institutions and associations" of Maitland and Otto Fvon Gierke.

39This is not to say the theology originated in legal theory or vice versa. Dr. Eusden is careful to show that the idea of a covenant in Puritan theology is not sprung from the common law. At best the theologians took up a convenient word, but they gave it an utterly unlegal content. pp. 29-30.

they found themselves. Each had strong motives to subscribe to such a view and each had the predisposition of themselves and those about them in their culture to incline them to this outlook. Subsequent history has shown, in addition, that there was considerable merit in the position. In an age of monistic societies, a theory of Pluralist living holds much attraction. Our pundits are engaged in much the same discussion when they speak of the closed versus the open society today.[40]

Nothing Dr. Eusden has to say indicates any simple organization of materials. He chose to write upon two groups in early seventeenth-century England and their influence on each other's and the day's politics. The common lawyers were a tiny group confined to those admitted to the inns of court; but their influence far transcended their numbers. When they brought pressure to bear politically, it was not in a royal court whose decline was upon it, but in a legislature whose greatness lay before it.[41] The Puritans also went to Parliament when hope of royal favor failed. They also were a minority, although a more important one. With the common lawyers, they exerted a powerful influence on the course of English politics. But it was no formal alliance; there was no plan of campaign; and there was no over-all objective toward which they strived. To speak of independent institutions, distributive justice, a pluralist society, is to endow past events with a later theory. The common lawyers wanted only to fend off competitors,[42] while Puritans desired only to prepare their souls for the New Jerusalem. But others had different ideas; and it was from the conflict that a libertarian theory of government was born.[43] Dr. Eusden asks the question, "Might it not be that the roots of political ideas are the intrinsic concerns and beliefs of particular groups who have been cast into the political arena?" He replies to himself by saying, "If so, a study of these groups and their conflicts is perhaps more important for the student of politics than the study of the great political philosophers who often are outside the arena."[44] His answer has to be tentative, for he must leave room for the effect of a philosopher such as Jeremy Bentham, whose work reshaped so much of the impress made by Puritans and common lawyers.[45] But it has a ring of truth to it even so. And it is not simple.

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[40]Dr. Eusden in his extensive bibliography, pp. 181-221, indicates not merely seventeenth century sources of such ideas, but also contemporary, and controversial, ideologues. The bibliography contains a convenient table of contents, p. 181, and useful comments on his bibliographical aids, pp. 182-184, and on the early seventeenth-century materials used, pp. 184-199.

[41]Coke's own successful career at the royal court indicates this was not due to preference but to the fact that what Coke desired to push, the monarchy was not interested in receiving. Parliamentary service against the crown was a late part of Coke's career.

[42]pp. 89-94 on the writs of prohibition.

[43]The highly competitive economic system lying behind the social and political results may well have been of greater importance for the existence of a plural society. Willard Hurst, "Law and the Conditions of Freedom" (1956), p. 6. Space limitations probably prevented Dr. Eusden from dealing with this, p. 177.

[44]pp. 178-179.

[45]pp. 162-163. "Every major reform in English law during the nineteenth century can be traced in part to the influence of the Benthamites." It was the thesis of a paper read by Stefan Riesenfeld at the Round Table on Legal History, December 29, 1957, at the meeting of the Association of American Law Schools, that many

Perhaps that is the most important point in Dr. Eusden's book. No part of the past can be made to conform to some single theory without doing the facts an injury. The explanation of a Puritan-common lawyer contribution upon a scheme of distributive justice is very ingenious, very helpful, and probably very true. But the trifling mentions made of Oliver Cromwell by Dr. Eusden[46] and the "foreboding . . . of common's demise, as some claim, in the suffocating clutches of administrative law"[47] indicate that this does not summarize all the truth. We know of our own day how complicated it is. If any of us were asked to write a history of the recent Jenner bill to limit the appellate jurisdiction of the United States Supreme Court, we would feel ill-used if expected to produce a simple account, setting forth transparent motives, and concluding with a theory explaining the pros and cons. But that is an easy task compared to the goal most historians set for themselves. To succeed in any degree is no small accomplishment. Dr. Eusden enjoys such a success in this book. His style is easy, his wit peeps through, his scholarship is worn without strain.[48] It is a book to read for pleasure, yet what it says cannot be legally put aside. What it says is provocative and what it does not say is a stimulator for thoughts as well. Anyone interested in the relation of pressure groups to law, power and ethics must find it interesting. As Dr. Eusden says when he puts Thucydides with Plato, "The stuff of political history comes in the main from the ideas of essentially nonpolitical groups who contend with the powers that be."[49] If the words "and individuals" are added after "groups," it would cover the field. Still, no one ought to be too dogmatic about it.[50] The past, like our present, defies easy analysis.

Earl F. Murphy
Secretary, American Society for Legal History
Assistant Professor
Temple University School of Law

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of these nineteenth century reforms had already appeared in the American colonies prior to 1700.

[46]p. 1 speaks of "the glorious age of John Pym, John Lilburne, Henry Ireton, Oliver Cromwell, and John Milton." Shades of Thomas Carlyle who exalted his Cromwell above "the Talking-Apparatus", the House of Commons. See Thomas Carlyle, ed., Letters and Speeches of Oliver Cromwell (1890), vol. 5, p. 131, "Elucidation" to Cromwell, speech dissolving Parliament, February 4, 1957-8.

[47]p. 149.

[48]The fact that he is assistant professor of religion at Yale University Divinity School is revealed in his personal comment on those who equate fundamental law with God: "To this the author would reply: Nothing can be God except God, not even fundamental law." p. 125, n. 25. The pastor will reveal himself!

[49]p. 179.

[50]Such a definition would, after all, exclude all the authors of "The Federalist" and Thomas Jefferson. As a meaningful statement it probably has greatest relevance to the period preceding the organization of political parties.

BOOKS RECEIVED

BASIC ESTATE PLANNING. By John A. Appleman. Cincinnati, O.: The Fred C. Rosselot Co. 1958. $37.50.

CASEBOOK OF THE CURIOUS AND TRUE. By Francis X. Busch. Indianapolis, Ind.: The Bobbs-Merrill Co., Inc. 1957. Pp. 228. $4.00.

CONSERVATION IN THE PRODUCTION OF PETROLEUM. By Erich W. Zimmerman. New Haven, Conn.: Yale University Press. 1957. Pp. 417. $6.00.

CRIME AND INSANITY. By Richard W. Nice. New York, N.Y.: Philosophical Library, Inc. 1958. Pp. 280. $6.00.

HOW TO PRACTICE LAW EFFECTIVELY. By John S. Bradway. New York, N. Y.: Oceana Publications. 1958. Pp. 96. $2.75.

INSTITUTE OF MINERAL LAW. Edited by Harriet S. Daggett and Frank S. Craig, Jr. Baton Rouge, La.: Louisiana State University Press. 1958. Pp. 174 $7.50.

INTERNATIONAL TRADE ARBITRATION. By Martin Domke. New York, N.Y.: American Arbitration Association. 1958. Pp. 311. $4.50.

KNOW THE LAW. By the Traffic Institute. Evanston, Ill.: Northwestern University. 1958. Pp. 442. $7.00.

LABOR. By Neil W. Chamberlain. New York, N.Y.: McGraw-Hill Book Company. 1958. Pp. 616.

LEGAL INSTRUMENTS OF FOUNDATIONS. By F. Emerson Andrews. New York, N.Y.: Russell Sage Foundation. 1958. Pp. 320. $4.50.

TAX PLANNING AND FEE SETTING FOR PROFITABLE LAW PRACTICE. By Jackson L. Boughner. New York, N.Y.: The Journal of Taxation, Inc. 1958. Pp. 106. $8.00.

THE DEFENSE ATTORNEY AND BASIC DEFENSE TACTICS. By Welcome D. Pierson. Indianapolis, Ind.: The Bobbs-Merrill Co. Inc. 1958. $15.00.

THE FEDERAL TORT CLAIMS ACT. By William B. Wright. New York, N.Y.: Central Book Co., Inc. 1958. $7.50.

THE LAW OF REAL PROPERTY. By R. E. Megarry and H.W.R. Wade. Toronto, Can.: The Carswell Company Limited. 1958. Pp. 999. $10.10.

SAVING TAXES THROUGH CAPITAL GAINS. By Arno Herzberg. Englewood Cliffs, N.J.: Prentice-Hall, Inc. 1957.

STATES RIGHTS—THE LAW OF THE LAND. By Charles J. Bloch. Atlanta, Ga.: The Harrison Company. 1957. $10.00.

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